SUPREME COURT
OF THE UNITED STATES

No. 08-1314
Title: Delbert Williamson, et al., Petitioners
v.
Mazda Motor of America, Inc., et al.
Docketed: April 24, 2009
Lower Ct: Court of Appeal of California, Fourth Appellate District, Division Three
Case Nos.: (G038845)
Decision Date: October 22, 2008
Rehearing Denied: November 18, 2008
Discretionary Court Decision Date: February 11, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 22 2009	Petition for a writ of certiorari filed. (Response due May 26, 2009)
May 19 2009	Order extending time to file response to petition to and including June 25, 2009.
Jun 25 2009	Brief of respondent Mazda Motor of America, Inc., et al. in opposition filed.
Jul 8 2009	DISTRIBUTED for Conference of September 29, 2009.
Oct 5 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Apr 23 2010	Brief amicus curiae of United States filed.
May 4 2010	DISTRIBUTED for Conference of May 20, 2010.
May 4 2010	Supplemental brief of respondents filed. (Distributed)
May 24 2010	Petition GRANTED limited to Question 1 presented by the petition.
Jun 8 2010	The joint appendix and petitioners' brief on the merits is due on or before July 30, 2010.
Jun 8 2010	Respondents' brief on the merits is due on or before September 21, 2010.
Jul 7 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 9 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents.
Jul 30 2010	Brief of petitioners Delbert Williamson, et al. filed.
Jul 30 2010	Joint appendix filed. (Statement of costs filed)
Aug 5 2010	Brief amicus curiae of Attorneys Information Exchange Group filed.
Aug 6 2010	Brief amicus curiae of United States filed.
Aug 6 2010	Brief amicus curiae of Constitutional Accountability Center filed.
Aug 6 2010	Brief amicus curiae of Public Justice, P.C. filed.
Aug 6 2010	Brief amici curiae of Illinois, et al. filed.
Aug 6 2010	Brief amicus curiae of American Association for Justice filed.
Aug 20 2010	CIRCULATED.

Aug 24 2010	SET FOR ARGUMENT ON Wednesday, November 3, 2010.
Sep 7 2010	Justice Kagan is recused in this case.
Sep 13 2010	Record received from Court of Appeal of California, Fourth Appellate District, Div. 3. (1 box)
Sep 20 2010	Brief amicus curiae of Product Liability Advisory Council, Inc. filed. (Distributed)
Sep 21 2010	Brief of respondents Mazda Motor of America, Inc., et al. filed. (Distributed)
Sep 28 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Sep 28 2010	Brief amicus curiae of Juvenile Products Manufacturers Association filed. (Distributed)
Sep 28 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 28 2010	Brief amici curiae of Grocery Manufacturers Association, et al. filed. (Distributed)
Sep 28 2010	Brief amici curiae of Alliance of Automobile Manufacturers, et al. filed. (Distributed)
Sep 28 2010	Brief amicus curiae of DRI - The Voice of the Defense Bar filed. (Distributed)
Oct 18 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Oct 20 2010	Reply of petitioners Delbert Williamson, et al. filed. (Distributed)
Nov 1 2010	Proposed lodging from counsel for the respondents.
Nov 3 2010	Argued. For petitioners: Martin N. Buchanan, San Diego, Cal.; and William M. Jay, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondnets: Gregory G. Garre, Washington, D. C.

Supreme Court, U.S.
FILED

No. _____ 081314 APR 22 2009

OFFICE OF THE CLERK

In The Supreme Court of the United States

DELBERT WILLIAMSON, et al.,

Petitioners,

vs.

MAZDA MOTOR OF AMERICA, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions?

2. Under this Court's recent ruling in *Wyeth v. Levine*, __ S. Ct. ___, 2009 WL 529172 (2009), does a federal motor vehicle safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts impliedly preempt a state tort suit alleging that the manufacturer should have warned consumers of the known dangers of a lap-only seatbelt installed in one of its vehicles?

PARTIES

Thanh Williamson, the decedent, was killed in a head-on collision when her body "jackknifed" around a lap-only seatbelt installed in one of the seats of her family's 1993 Mazda MPV Minivan. There was no lap/shoulder seatbelt installed in her seating position. The other occupants of the vehicle were seated in positions equipped with lap/shoulder seatbelts and survived the crash.

Petitioners Delbert and Alexa Williamson are the decedent's surviving husband and daughter. Petitioner Estate of Thanh Williamson is the estate of the decedent. Respondents Mazda Motor Corporation and Mazda Motor Corporation of America, Inc. dba Mazda North American Operations (collectively "Mazda") manufactured the Mazda MPV Minivan at issue here.

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The published opinion of the California Court of Appeal, Fourth Appellate District, Division Three is reported at *Williamson v. Mazda Motor of America, Inc.*, 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008). The California Supreme Court's order denying discretionary review is unreported, No. S168717. App. 31.

JURISDICTION

The California Court of Appeal's decision was issued on October 22, 2008. App. 1. The California Supreme Court denied discretionary review on February 11, 2009. App. 31. This Court has jurisdiction to review the federal preemption issues decided by the California Court of Appeal under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This petition raises a federal preemption issue under the Supremacy Clause of the United States Constitution. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

Laws of any State to the Contrary notwithstanding." U.S. Const. Art. 6, cl. 2.

The California Court of Appeal ruled that petitioners' lawsuit was preempted by Federal Motor Vehicle Safety Standard ("FMVSS") 208. The National Traffic and Motor Vehicle Safety Act ("Safety Act") defines a "motor vehicle safety standard" as "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9). The savings clause of the Safety Act provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

In 1967, the National Highway Traffic Safety Administration ("NHTSA") adopted the first set of federal motor vehicle standards pursuant to the Safety Act. 32 Fed. Reg. 2408 (Feb. 3, 1967). In the preamble, NHTSA made "findings . . . with respect to all standards." *Id.* at 2408. These included the following: "Each standard is a minimum standard for motor vehicle or equipment performance which is practicable and meets the need for motor vehicle safety. . . ." *Id.*

As originally enacted in 1967, FMVSS 208 allowed manufacturers to install either lap-only (Type 1) or lap/shoulder (Type 2) seatbelts in all rear seating positions of passenger vehicles. The relevant portion of the 1967 regulation stated: "Except as provided in S3.1.1 and S3.1.2, a Type 1 or Type 2 seat belt assembly that conforms to Motor Vehicle Safety

Standard No. 209 shall be installed in each passenger car seat position." *Id.* at 2415.

In 1989, NHTSA adopted two new regulations amending FMVSS 208 and mandating that passenger vehicles "shall be equipped with an integral Type 2 [lap/shoulder] seat belt assembly at every forward-facing rear outboard designated seating position." 54 Fed. Reg. 46257, 46266 (Nov. 2, 1989); 54 Fed. Reg. 25275, 25278 (June 14, 1989). The regulations defined a "rear outboard designated seating position" to mean "any 'outboard designated seating position' (as that term is defined at 49 CFR 571.3) that is rearward of the front seat(s), except any designated seating position adjacent to a walkway located between the seat and the side of the vehicle, which walkway is designed to allow access to more rearward seating positions." 54 Fed. Reg. 46257, 46266 (Nov. 2, 1989).

NHTSA specifically concluded that lap/shoulder belts are safer and more effective than lap-only belts in rear seating positions. 54 Fed. Reg. 46257, 46257-46258 (Nov. 2, 1989); 54 Fed. Reg. 25275, 25275-25276 (June 14, 1989). On the issue of compatibility with car seats, NHTSA stated: "[T]he agency believes that this proposal would offer benefits for children riding in some types of booster seats, would have no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts, and would offer older children the same incremental safety protection that would be

afforded adult rear seat occupants." 53 Fed. Reg. 47982, 47988-47989 (Nov. 29, 1988).

When it adopted the 1989 regulations, NHTSA decided not to require lap/shoulder belts for rear-center seating positions solely because it found "that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder benefits at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); *see also* 53 Fed. Reg. 47982, 47984 (Nov. 29, 1988).

NHTSA also decided not to mandate lap/shoulder belts for the aisle seats of multi-passenger vehicles, such as Thanh's seat in the Mazda MPV Minivan. The basis for this decision was a concern "that locating the anchorage for the upper end of the shoulder belt on the aisle side of the vehicle would stretch the shoulder belt across the aisleway and cause entry and exit problems for occupants of seating positions to the rear of the aisleway seating position." 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989). However, NHTSA stated: "Of course, in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with the aisleway's purpose of allowing access to more rearward seating positions, NHTSA encourages the manufacturers to do so." *Id.* at 46258.

The 1989 regulations were in effect when the Williamsons' 1993 Mazda MPV Minivan was manufactured. In December 2002, President George W. Bush signed into law "Anton's Law," which required NHTSA to issue a new rule mandating installation of lap/shoulder belts in *all* rear seating positions of passenger vehicles. Pub.L. 107-318, § 5, 116 Stat. 2772 (Dec. 4, 2002) (quoted in Historical and Statutory Notes following 49 U.S.C.A. § 30127). NHTSA issued a new rule requiring lap/shoulder belts in all rear seating positions in December 2004. 69 Fed. Reg. 70904 (Dec. 8, 2004). In doing so, NHTSA confirmed that FMVSS 208 was "not intended to preempt state tort civil actions" except in one narrowly defined area not relevant here. *Id.* at 70912.

STATEMENT OF THE CASE

On August 14, 2002, Delbert Williamson and his wife, Thanh Williamson, were traveling with their daughter Alexa in their 1993 Mazda MPV Minivan. They were driving north on Route 89 in Kane County, Utah. Delbert was the driver, Thanh was seated in the right-hand aisle seat of the middle row, and their daughter was seated immediately to her left directly behind the driver's seat. Delbert and Alexa were both

wearing lap/shoulder seatbelts. Thanh was wearing a lap-only seatbelt. AA 283, 285; ARB at 8, n.1.[1]

A motor home towing a Jeep Wrangler was traveling in the opposite direction on Route 89. Suddenly, the Jeep Wrangler became detached from the motor home. The Jeep Wrangler crossed into oncoming traffic and struck the Williamsons' van. AA 283, 285.

Thanh was killed when the forces of the collision caused her body to "jackknife" around her lap-only seatbelt, resulting in severe abdominal injuries and internal bleeding. Delbert and Alexa suffered non-fatal injuries. AA 283, 285.

Thanh's survivors and her estate filed suit in California state court, asserting state tort claims including products liability and negligence. The Third Amended Complaint alleged in relevant part: (i) Thanh's seat should have been equipped with a lap/shoulder belt to restrain her upper torso in a frontal collision; and (ii) Mazda failed to adequately warn plaintiffs of the known hazards, risks, and dangers of the lap-only seatbelt installed in Thanh's seating position. AA 289-295.

In a motion for judgment on the pleadings and a subsequent demurrer, Mazda asserted that these

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[1] All citations to "AA" refer to the Appellants' Appendix filed in the California Court of Appeal. "ARB" refers to the Appellants' Reply Brief filed in the California Court of Appeal.

state law claims were preempted by FMVSS 208 under the Supremacy Clause of the United States Constitution. AA 55-66, 324-336. Mazda argued that the claims were preempted because they were in conflict "with the choice that federal law gave to manufacturers to choose which type of safety belt they would install in those center seats." AA 56. The trial court ultimately sustained Mazda's demurrer without leave to amend as to all of plaintiffs' claims arising out of the death of Thanh Williamson. AA 543-544.

In a published opinion, the California Court of Appeal affirmed the judgment. *Williamson v. Mazda Motor of America, Inc.*, 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008). Applying the doctrine of implied obstacle preemption under *Geier* and the Supremacy Clause, App. 6-24, the California Court of Appeal ruled that "FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option. . . ." App. 24. The court ruled that the failure to warn theory of liability was "also barred by federal preemption." App. 26.

Plaintiffs filed a Petition for Review in the California Supreme Court solely on the federal preemption issue. The California Supreme Court denied discretionary review on February 11, 2009. App. 31.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER COMMON-LAW CLAIMS FOR FAILURE TO INSTALL LAP/SHOULDER SEATBELTS ARE IMPLIEDLY PREEMPTED BY FMVSS 208 AND TO RESOLVE CONFLICTS IN THE LOWER COURTS OVER THE MEANING OF *GEIER* AND *SPRIETSMA*

A. Introduction

The California Court of Appeal followed a growing body of federal and state case law that has broadly construed this Court's 5-4 preemption decision in *Geier v. American Honda Company, Inc.*, 529 U.S. 861 (2000) and narrowly construed its unanimous "no preemption" decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). As construed by these lower courts, *Geier* purportedly holds "that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted." *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377, 383 (7th Cir. 2000). *Accord Carden v. General Motors Corp.*, 509 F.3d 227, 230-31 (5th Cir. 2007); *Griffith v. General Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002); *Heinricher v. Volvo Car Corp.*, 61 Mass. App. Ct. 313, 318-19, 809 N.E.2d 1094 (Mass. App. Ct. 2004). Based on this understanding of *Geier*, these courts have ruled that a tort suit challenging a manufacturer's

use of one of the seatbelt options allowed by FMVSS 208 is preempted by federal law.

These courts have also concluded that *Sprietsma*'s holding – that a federal agency's decision not to mandate a particular safety device has no preemptive effect unless it reflects an authoritative federal policy against the device – applies only when there is a "complete absence of regulatory action." *Carden*, 509 F.3d at 232; *Roland v. General Motors Corp.*, 881 N.E.2d 722, 728-29 (Ind. App. 2008).

These interpretations of *Geier* and *Sprietsma* are wrong and they conflict with the decisions of other appellate courts. Certiorari should be granted to resolve these conflicts and to preserve the cooperative federalist scheme contemplated by Congress when it enacted the Safety Act. Congress expressly allowed state tort law to continue to operate in conjunction with the federal "minimum" standards to achieve greater vehicle safety. 49 U.S.C. §§ 30102(a)(9), 30103(e). By preempting state tort suits that seek to impose higher common-law standards, these cases frustrate the intent of Congress and undermine its fundamental goal of achieving vehicle safety.

B. *Geier* Was Based on the Unique Regulatory History of the 1984 Regulations on Passive Restraints in Front Seating Positions

In *Geier*, the plaintiff filed a state tort claim alleging that her vehicle was defective because the

front driver's seat was not equipped with an airbag. The issue was whether the 1984 version of FMVSS 208 relating to "passive restraints" in front seating positions preempted a state common-law tort action alleging that the defendant manufacturer should have equipped its vehicle with front airbags.[2]

Geier first held that the express preemption clause of the Safety Act, 49 U.S.C. § 30103(b)(1), did *not* preclude state tort liability. Based on the Act's savings clause, 49 U.S.C. § 30103(e), the Court concluded that Congress intended to "leav[e] adequate room for state tort law to operate – for example, where federal law creates only a floor, *i.e.*, a minimum safety standard." *Geier*, 529 U.S. at 868. The Court therefore found that the Safety Act "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

The Court next considered whether the savings clause foreclosed "the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as preempting state laws (including

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[2] The passive restraints regulation at issue in *Geier* did not apply to rear seating positions. 49 Fed. Reg. 28962 (July 17, 1984). "Passive restraints" are "devices that do not depend for their effectiveness on any action by the vehicle occupant," such as "airbags and automatic seatbelts." *Geier*, 529 U.S. at 889-90 (Stevens, J., dissenting). Manual seatbelts are not passive restraints, as they must be fastened manually. *Id.* at 880 (distinguishing between "ordinary manual lap and shoulder seat belts" and "passive restraints").

common-law rules) that 'actually conflict' with the statute or federal standards promulgated thereunder." *Geier*, 529 U.S. at 869. On this issue, the Court ruled that the savings clause "does *not* bar the ordinary working of conflict pre-emption principles." *Ibid.*

Finally, the Court considered whether Geier's state tort claim actually conflicted with the 1984 version of FMVSS 208 relating to passive restraints in front seating positions. *Geier*, 529 U.S. at 874-87. Although *Geier* held "that a court should not find pre-emption too readily in the absence of clear evidence of a conflict," *id.* at 885, the majority opinion concluded that Geier's suit would stand as an obstacle to the objectives of the passive restraint regulations contained in the 1984 version of FMVSS 208. Based on the regulatory history, the Court found that the 1984 regulations were intended to achieve a gradually developing mix of alternative passive restraint devices for front seating positions. *Id.* at 877-81, 886.

The Court concluded that Geier's tort claim conflicted with these regulatory objectives. First, the Court found Geier's theory that state common law imposed a duty to install airbags – as opposed to any other type of passive restraints – "presented an obstacle to the variety and mix of devices that the federal regulation sought." *Geier*, 529 U.S. at 881. Second, the Court noted that Geier's vehicle was manufactured during the initial phase-in period when the 1984 regulation "required only that 10% of a manufacturer's nationwide fleet be equipped with *any*

passive restraint device at all." *Ibid.* Thus, Geier's claim that *all* vehicles manufactured during this period should have been equipped with airbags "would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Ibid.*

From the very first sentence of its opinion, the majority in *Geier* repeatedly emphasized that its ruling was based solely on the *1984* version of FMVSS 208 governing passive restraints in front seating positions. *Geier*, 529 U.S. at 864 ("This case focuses on the 1984 version" of FMVSS 208 regarding "passive restraints"); *id.* at 874-75 (citing 1984 Department of Transportation ("DOT") comments in Federal Register "which accompanied the promulgation of FMVSS 208"); *id* at 877 (referring to "the version [of FMVSS 208] that is now before us"); *id.* at 877 (referring to "DOT's own contemporaneous explanation of . . . the 1984 version of FMVSS 208"); *id.* at 879 (referring to "[t]he 1984 FMVSS 208 standard" on "passive restraints"); *id.* at 881 (summarizing the purpose of "the 1984 version of FMVSS 208"); *id.* at 886 (referring to "the contemporaneous 1984 DOT explanation" of its passive restraints regulation).

Geier is inapplicable here. This case does not involve the unique regulatory history of the 1984 version of FMVSS 208 relating to passive restraint devices in front seating positions. Instead, it involves the *1989* version of FMVSS 208 relating to *manual* seatbelts in *rear* seating positions. Unlike the 1984 airbag regulations, nothing in the regulatory history

of the 1989 regulations suggests that NHTSA intended to achieve a gradual phase-in of a variety of different types of seatbelts in rear seating positions. On the contrary, the agency recognized that lap/shoulder seatbelts were inherently safer and its regulations were intended to achieve "the *earliest possible implementation* of a requirement for rear-seat lap/shoulder belts." 54 Fed. Reg. 25275, 25276 (June 14, 1989) (italics added); *see also id.* at 25277; 54 Fed. Reg. 46257, 46258, 46265 (Nov. 2, 1989).

For these reasons, a state tort suit alleging that all rear seating positions should have been equipped with lap/shoulder belts in 1993 would not stand as an obstacle to the federal seatbelt regulations promulgated in 1989. "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989).

C. Many State and Federal Courts Have Misconstrued *Geier* and Applied an Overly Broad Interpretation of Its Implied Preemption Holding

As noted, many state and federal courts have interpreted *Geier* to preempt state common-law suits whenever they would foreclose one of several equipment options authorized by a federal motor vehicle safety standard. This overbroad interpretation is not supported by anything in this Court's opinion. The

majority did not base its holding on the mere existence of regulatory options; it relied on evidence that the agency had adopted an authoritative federal policy designed to give vehicle manufacturers a variety of passive restraint choices and achieve a mix of different types of passive restraints in front seating positions. In fact, *Geier* cited earlier Supreme Court authority which it characterized as holding that a state common-law tort theory is preempted only where it "limit[s] the availability of an option *that the federal agency considered essential to ensure its ultimate objectives*." *Geier*, 529 U.S. at 882 (emphasis added & citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982)). Under *Geier*, if the federal agency does *not* consider the availability of a particular option to be essential to its objectives, a common-law theory foreclosing that option does not stand as an obstacle to the agency's goals and is not preempted.

The broad "options always preempt" interpretation of *Geier* is directly contrary to the statutory scheme enacted by Congress. Even when a motor vehicle safety standard provides different options for compliance, it is still by definition only a "minimum standard." 49 U.S.C. § 30102(a)(9). Indeed, when NHTSA first enacted FMVSS 208 and gave manufacturers the option of installing either lap-only or lap/shoulder belts in rear seating positions, the agency confirmed that "all standards" were only "minimum standard[s]." 32 Fed. Reg. 2408, 2408 (Feb. 3, 1967). The agency has never retreated from

this position. Further, the savings clause of the Safety Act provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). By holding that federal law preempts a state tort suit whenever it would foreclose an option permitted by a minimum safety standard, these cases threaten to convert the federal safety floor created by Congress into a national liability ceiling.

These cases are also contrary to the consistently stated views of the agency itself. In *Geier*, the Court relied on amicus briefs submitted by the United States on behalf of the DOT in three different Supreme Court cases. In each of those amicus briefs, the DOT consistently stated its position that "no airbag" lawsuits would conflict with its specific objectives in promulgating the *1984 version* of FMVSS 208 governing passive restraints. *Geier*, 529 U.S. at 883 (quoting Briefs for the United States as Amicus Curiae in *Geier*, No. 98-1911, *Freightliner Corp. v. Myrick*, No. 94-286, and *Wood v. General Motors Corp.*, No. 89-46). *Geier* concluded that the agency's position as to the preemptive effect of its own regulations was entitled to "special weight." *Id.* at 886.

In those very same amicus briefs, however, the DOT specifically rejected the broad theory of implied preemption embraced by the California Court of Appeal's decision. In *Wood*, for example, the federal government's amicus brief stated:

> Respondent argues that FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints. [Citations.] We disagree with this reasoning. . . . That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law.

AA 414-415.

Similarly, in *Freightliner*, the amicus brief filed by the United States stated: "Although the majority of courts to have considered the question have concluded that 'no-airbag' suits are preempted, they have done so on a broader theory of implied preemption with which the United States does not agree, i.e., that the existence of 'options' to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option." AA 457-458, n.16.

And in *Geier* itself, the amicus brief for the United States argued: "[S]tate tort law does not conflict with a federal 'minimum standard' . . . merely because state law imposes a more stringent requirement. . . . We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose." AA 488 & n.18.

As *Geier* establishes, the DOT's consistently stated views as to the preemptive effect of its own

regulations are entitled to "special weight." *Geier*, 529 U.S. at 886. Because NHTSA has clearly indicated that it does not intend its own regulatory options to preempt all state tort claims that effectively foreclose one of those options, the broad "options always preempt" theory of implied preemption adopted by some lower courts should not be allowed to stand uncorrected.

Other federal and state courts have correctly recognized that "*Geier* does not automatically exempt automobile manufacturers from liability whenever a federal regulation provides them with options as to the type of restraint system to be employed." *Chevere v. Hyundai Motor Co.*, 774 N.Y.S.2d 6, 4 A.D.3d 226, 227 (N.Y. App. Div. 2004); *see also O'Hara v. General Motors Corp.*, 508 F.3d 753, 762-63 (5th Cir. 2007) (holding that NHTSA's decision to give manufacturers an option between laminated or tempered glass for side windows in FMVSS 205 did not preempt tort claim for failure to install laminated glass).

Certiorari should be granted on this issue because the line of cases followed by the California Court of Appeal threatens to undermine the valuable role Congress intended state tort law to play in providing incentives for manufacturers to develop safer vehicles than the federal minimum standards. If allowed to stand, these cases would immunize manufacturers from tort liability whenever they install one of the equipment options permitted by the federal minimum safety standards. That cannot be what Congress had in mind when it stated that compliance

with a motor vehicle safety standard "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

D. Many State and Federal Courts Have Misconstrued *Sprietsma* and Applied an Overly Narrow Interpretation of Its Implied Preemption Holding

Two years after *Geier*, this Court decided *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). In a unanimous decision, the Court distinguished *Geier* in ruling that the Coast Guard's "intentional and carefully considered" decision not to mandate boat propeller guards did not preempt a state tort action based on the defendant's failure to install a propeller guard. *Id.* at 67. The Coast Guard's decision was based primarily on "available data" regarding the costs, technical feasibility, and relative safety benefits of mandating a universally acceptable propeller guard for all modes of boat operation. *Id.* at 61-62, 66-67. However, the Coast Guard did not make any "policy" judgment that states "should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as unsafe." *Id.* at 67. Because the Coast Guard's cost-benefit analysis did "not convey an 'authoritative message' of a federal policy against propeller guards," this Court found that the plaintiff's tort claim was not preempted. *Id.* at 67-68.

Just as the Coast Guard in *Sprietsma* "did not reject propeller guards as unsafe," *Sprietsma*, 537 U.S. at 67, NHTSA has never rejected lap/shoulder belts as unsafe for non-outboard rear seating positions. On the contrary, the agency recognized in 1989 that lap/shoulder belts are safer and more effective in rear seating positions. 54 Fed. Reg. 46257, 46257-46258 (Nov. 2, 1989); 54 Fed. Reg. 25275, 25275-25276 (June 14, 1989). In 1989, NHTSA decided not to mandate lap/shoulder belts for non-outboard seats primarily because it believed that this still posed "more technical difficulties" and there were "small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989).[3]

This cost-benefit analysis is indistinguishable from the Coast Guard's reasoning for its decision not to mandate propeller guards in *Sprietsma*. It does "not reflect an 'authoritative' message of a federal policy against" lap/shoulder belts in non-outboard seating positions. *Sprietsma*, 537 U.S. at 67. Just as

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[3] For the type of aisle seat occupied by Thanh Williamson, NHTSA even "encourage[d]" manufacturers to install lap/shoulder belts if they could do so without obstructing the aisle. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989). By 1993, when the Williamsons' vehicle was manufactured, there *were* technologically and economically feasible ways of anchoring the lap/shoulder belt directly to the seat without obstructing the aisle. Petitioners are not claiming that Mazda had a duty to install a lap/shoulder belt that would have obstructed the aisle.

the Coast Guard "left the law applicable to propeller guards exactly the same as it had been before," *id.* at 65, NHTSA left the law applicable to these seating positions exactly the same as it had been for over 20 years. Under *Sprietsma*, the agency's 1989 decision not to mandate lap/shoulder belts for these seating positions has no preemptive effect.

In refusing to apply *Sprietsma*, the California Court of Appeal followed a recent line of cases holding that *Sprietsma* is strictly limited to situations involving a "complete absence of regulatory action." App. 20 (citing *Carden v. General Motors Corp.*, 509 F.3d 227, 232 (5th Cir. 2007); *Roland v. General Motors Corp.*, 881 N.E.2d 722, 728-29 (Ind. App. 2008)). However, nothing in *Sprietsma* suggests that its holding is so limited. *Sprietsma* itself cannot fairly be characterized as a case involving complete absence of regulatory action. As this Court noted, the Coast Guard had in fact "promulgated a host of detailed regulations" on boat safety and performance, including "the use of specified equipment" and "precise standards governing the design and manufacture of boats themselves and of associated equipment, such as electrical and fuel systems, ventilation, and 'start-in-gear protection' devices." *Sprietsma*, *supra*, 537 U.S. at 60. Thus, *Sprietsma* was a case involving an agency's deliberate and carefully considered decision not to mandate *one particular type* of safety device.

This Court and others have applied *Sprietsma* in circumstances that did not involve a complete absence of regulatory action. *See, e.g.*, *Altria Group, Inc.*

v. Good, 129 S. Ct. 538, 550-51 (2008) (holding that state law claims against tobacco manufacturers for misrepresenting that cigarettes were "light" and had "lowered tar and nicotine" were not preempted by Federal Trade Commission's failure to require correction of misleading statements); *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 591-93 (E.D. Pa. 2008) (holding that Federal Drug Administration's decision not to mandate additional pediatric warning for drug did not convey an "authoritative message of federal policy" sufficient to preempt a state law failure to warn claim); *MCI Sales and Service, Inc. v. Hinton*, 272 S.W.3d 17, 23-28 (Tex. App. 2008) (holding that FMVSS 208 and NHTSA's decision not to mandate passenger seatbelts on motor coach buses did not constitute clear expression of federal policy sufficient to preempt common-law claim of duty to install passenger seatbelts on motor coach buses); *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations*, 41 Cal. 4th 929, 945-50 (2007) (holding that United States Fish and Wildlife's extensive regulatory history regarding kangaroo species did "not establish any 'authoritative' policy against state regulation").

Most notably, in a case decided just two weeks before the Fifth Circuit's decision in *Carden*, a different panel of the Fifth Circuit applied and followed *Sprietsma* even though NHTSA had promulgated a specific safety regulation on the exact subject at issue. In *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), the Fifth Circuit ruled that a

common-law claim alleging that a vehicle should have been equipped with laminated glass windows was not preempted by federal law. Notably, there was a federal regulation in place (FMVSS 205) that specifically gave manufacturers the option of using either laminated or tempered glass for side windows. Even so, the Fifth Circuit found that NHTSA's decision not to mandate laminated glass was based on "cost concerns and minor safety issues" of a type that did "'not convey an authoritative message of a federal policy against'" laminated glass under the holding of *Sprietsma*. *Id.* at 762-63 (quoting *Sprietsma*, 537 U.S. at 67). These are exactly the same types of reasons NHTSA cited when it decided not to mandate lap/shoulder belts for non-outboard seating positions in 1989. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989).

Certiorari should be granted to resolve this conflict between the lower appellate courts. There is no conceivable reason to confine *Sprietsma* solely to cases involving a complete absence of regulatory action. Whenever a federal agency decides not to impose a particular safety requirement, its decision should have preemptive effect only if it conveys an authoritative message of federal policy against the requirement. Otherwise, state tort suits will be preempted in the absence of any genuine conflict with federal law.

As this Court has recently confirmed, the presumption against preemption fully applies to implied conflict preemption. *Wyeth v. Levine*, ___ S. Ct. ___, 2009 WL 529172, at *5 n.3 (2009). Ordinarily, "the

absence of a federal standard cannot implicitly extinguish state common law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 282 (1995) (holding that absence of federal safety standard on anti-lock brakes did not impliedly preempt state common-law duty to install anti-lock braking system). Especially in cases where Congress has stated an intention to allow state common law to operate in conjunction with federal law, state tort law should never be displaced by a federal agency's decision not to impose a particular safety standard unless there is "clear evidence of a conflict" between state and federal policies. *Geier*, 529 U.S. at 88.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER COMMON-LAW CLAIMS FOR FAILURE TO WARN ABOUT THE DANGERS OF LAP-ONLY SEATBELTS ARE IMPLIEDLY PREEMPTED BY FMVSS 208

The same line of cases discussed above also held that FMVSS 208 preempts a state tort claim alleging that a vehicle manufacturer had a duty to warn about the known risks of one of the seatbelt options authorized by the federal standard. The California Court of Appeal followed these cases in ruling that petitioners' failure to warn theory of liability was "also barred by federal preemption." App. 26 (citing *Carden* 509 F.3d at 233; *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769-70 (11th Cir. 1998); *Roland*, 881 N.E.2d at 729-30). However, these holdings simply cannot be reconciled

with this Court's recent ruling in *Wyeth v. Levine*, ___ S. Ct. ___, 2009 WL 529172 (2009). Certiorari should be granted on this issue because the lower courts have decided an important question of federal preemption inconsistently with this Court's decision in *Wyeth*.

In *Wyeth*, the federal Food and Drug Administration ("FDA") approved as safe and effective the injectable form of a drug called Phenergan and also approved Wyeth's labeling of the drug. However, the FDA did not mandate additional warnings regarding known risks of the "IV-push" method of administration, whereby the drug is injected directly into a patient's vein. The plaintiff suffered injury from an IV-push injection of Phenergan and sued the manufacturer on a failure to warn theory under state law. *Wyeth*, 2009 WL 529172, at *2-3.

This Court held that the plaintiff's failure to warn theory was not preempted by federal law. First, the Court found that it was possible for Wyeth to comply with a state-law duty to modify Phenergan's labeling without violating the federal labeling requirements. *Wyeth*, 2009 WL 529172, at *7-9. Second, the Court held that imposing a state-law duty to provide a stronger warning would not obstruct the purposes and objectives of the federal drug labeling regulations. *Id.* at *10-13. The Court concluded that Congress intended the Food, Drug, and Cosmetic Act to operate in conjunction with state law to provide broad consumer protection. *Id.* at *10. The Court noted:

> As Justice O'Connor explained in her opinion for a unanimous Court: "The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."

Id. (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

Under the holding of *Wyeth*, the mere fact that a federal agency has approved a product as safe and effective does not automatically preempt a state-law claim for failure to warn of the product's known risks. In *Wyeth*, this Court expressly ruled that the plaintiff's failure to warn claim was not preempted by the FDA's approval of the drug and its labeling. Similarly, petitioners' failure to warn claim is not preempted by NHTSA's approval of lap-only seatbelts as the minimum federal safety standard for some vehicle seating positions. As in *Wyeth*, Congress has clearly expressed its intention to allow state common law to operate in conjunction with federal "minimum" standards to achieve greater vehicle safety. 49 U.S.C. §§ 30102(a)(9), 30103(e). Requiring vehicle manufacturers to warn consumers about the known risks of lap-only seatbelts is no more of an obstacle to federal law than requiring drug manufacturers to provide stronger warnings about the known risks of a drug approved by the FDA.

Certiorari should be granted on this issue because it is an important question of federal preemption that has been wrongly decided by the lower federal and state courts. To ensure that state tort law continues to play its proper role in achieving greater vehicle safety than just the federal minimum standards, this Court should intervene to correct these erroneous decisions.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DELBERT WILLIAMSON et al., Plaintiffs and Appellants, v. MAZDA MOTOR OF AMERICA, INC., et al., Defendants and Respondents.	G038845 (Super. Ct. No. 04CC06494) OPINION (Filed Oct. 22, 2008)

Appeal from a judgment of the Superior Court of Orange County, Hugh Michael Brenner, Judge. Request for judicial notice. Judgment affirmed. Request granted.

Niddrie, Fish & Buchanan, Martin N. Buchanan; Law Offices of David J. Bennion, David J. Bennion; Girardi & Keese, David R. Lira, Shahram A. Shayesteh and Howard B. Miller for Plaintiffs and Appellants.

Bowman and Brooke, Brian Takahashi, Robert S. Robinson and David R. Kelly for Defendants and Respondents.

Mayer Brown, Donald M. Falk, Erika Z. Jones and Adam C. Sloane for Alliance of Automobile Manufacturers, Inc., as Amicus Curiae on behalf of Defendants and Respondents.

Hugh F. Young, Jr.; Snell & Wilmer, Richard A Derevan, Gary A. Wolensky and Todd E. Lundell for Product Liability Advisory Council, Inc., as Amicus Curiae on behalf of Defendants and Respondents.

OPINION

RYLAARSDAM, J.

This appeal concerns Federal Motor Vehicle Safety Standard 208 (49 C.F.R. § 571.208 (2008); FMVSS 208), a regulation promulgated under the National Traffic and Motor Vehicle Safety Act (49 U.S.C. § 30101 et seq.; Safety Act), which authorizes automobile manufacturers to install a lap-only seatbelt at the inboard seating positions of a vehicle. The issue is whether the regulation preempts a common law tort action against a manufacturer for not choosing the option to install a lap/shoulder seatbelt at such a position. We conclude that under the United States Supreme Court's decision in *Geier v. American Honda Motor Company, Inc.* (2000) 529 U.S. 861 [120 S.Ct. 1913, 146 L.Ed.2d 914] and its progeny this claim is preempted because it conflicts with FMVSS 208.

In addition, while plaintiffs alleged other grounds for recovery not barred by federal preemption, in light of their concessions the failure to use a lap/shoulder seatbelt was "integral" to the case, we affirm the judgment dismissing the action.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Delbert Williamson, Alexa Williamson, through Delbert as her guardian ad litem, and the Estate of Thanh Williamson sued defendants Mazda Motor of America, Inc. and Mazda Motor Corporation for strict products liability, negligence, deceit, and wrongful death arising from injuries suffered in a front-end motor vehicle collision between their 1993 Mazda MPV Minivan and another vehicle.

According to the second amended complaint, Delbert and Alexa Williamson wore "three-point [lap/shoulder] seatbelts" at the time while Thanh Williamson, "sitting in the middle seat of the [vehicle's] middle row," wore "only . . . a two-point seatbelt or lap[ ]belt." The complaint alleged all three occupants suffered injuries in the crash, but Thanh's injuries were fatal because "the forces generated by th[e] collision caused her body to 'jackknife' around her defective lap[ ]belt, causing severe abdominal injuries and internal bleeding." Plaintiffs claimed defendants were liable because they designed, manufactured, marketed, and sold a minivan that, among other things, "was equipped with inferior . . . two-point lap[ ]belts in the middle seating positions, when it should reasonably have been equipped with three-point seat[ ]belts[ ] as [were] the [vehicle's] remaining seats," and that defendants knew "of the dangers of two-point lap[ ]belts," but "failed to warn . . . consumers," including plaintiffs, "of such dangers."

Defendants answered the amended complaint and then moved for judgment on the pleadings. They argued federal preemption barred plaintiffs' allegation Thanh Williamson's death "was directly attributable to the center seat being equipped with a lap safety belt" rather than "a lap and shoulder belt" because it "directly conflict[ed] with the choice that federal law gave to manufacturers. . . ." The trial court granted the motion with leave to amend. It agreed federal law precluded a state tort action "to the extent [the] theory of liability [was] the lap[-]only seat belt," but recognized plaintiffs had sufficiently pleaded other "theories of liability as to . . . the decedent's death. . . ."

The third amended complaint substantially repeated the foregoing allegations. It described the minivan as defective, in part, because defendants "equipped [it] with an inferior and unsafe lap-only belt" for "[t]he center seating position of the middle bench seat" that "did not restrain the upper torso of decedent. . . ." It also alleged defendants breached their duty of care by "fail[ing] to adequately warn . . . about the hazards, risks, and dangers of such defects." (Capitalization omitted.) In addition, it pleaded "[t]he defects and failures alleged . . . were joint and concurrent causes of [p]laintiff[s'] injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together. . . . But for the presence of all of these defects, Thanh Williamson's injuries would not have been as severe nor would she have died. . . ."

Defendants filed a demurrer and a motion to strike, reasserting the federal preemption argument. They noted this pleading conflicted with the trial court's prior ruling and also argued plaintiffs had effectively admitted "*all* of their claims – relating to Thanh Williamson – are based on" the allegation her "death ar[ose] from the lap-only belt," and thus the pleading's other theories of liability, including the failure to warn allegation, were preempted as well.

When the hearing began, the court announced it had tentatively decided to overrule the demurrer. The judge acknowledged "I have ruled . . . you can't have liability just based on [defendant's decision to install] a lap[ ]belt" and, "to the extent you . . . can find that language in [the third amended complaint] . . . I don't think [plaintiffs are] going to be able to proceed on that." But the federal preemption claim notwithstanding, the trial judge noted, "that doesn't mean that you couldn't state a cause of action" for "negligen[ce] in how you hooked it up or negligen[ce] in how you design the seat that was going to accommodate it, or any other tort theory."

However, at the request of plaintiffs' counsel, the court sustained the demurrer without leave to amend "as to all of plaintiffs' claims arising out of the death of Thanh Williamson. . . ." Counsel explained that, after "the last hearing . . . I thought long and hard after reading all the briefs . . . , considering the court's order and being the person that would try this case on behalf of plaintiffs," about "[w]hat evidence can I put on and what evidence will be barred based

on the ruling[.]" He answered this question, declaring "with the court's ruling as it presently stands, I don't think I could put on a case on behalf of my clients. I really don't. [¶] . . . [¶] If you strike all these [wrong seatbelt option] allegations, I am left with nothing. . . . [¶] . . . [¶] . . . [T]he court's ruling [is] we can't talk about the [seat]belt. But the [seat]belt is integral because had [Thanh Williamson] had the three-point belt like the two other occupants, she would be here today. They survived. [¶] . . . [¶] . . . I don't want to charge my clients the cost of . . . experts . . . and spend . . . money for a claim that is not going to have any legs if we cannot refer to the three-point versus two-point belt. We won't be able to do it. [¶] I will be trying a case" and "you . . . might as well give a nonsuit."

Subsequently, the parties stipulated to a dismissal of plaintiffs' remaining claims for personal injuries to Dexter and Alexa Williamson with prejudice. Based thereon, the trial court entered judgment for defendants.

DISCUSSION

1. Federal Preemption

"The supremacy clause of article VI of the United States Constitution grants Congress the power to preempt state law. State law that conflicts with a federal statute is '"without effect."' [Citations.]" (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923.) "Federal regulations

have no less pre-emptive effect than federal statutes." (*Fidelity Federal Sav. and Loan Ass'n. v. de la Cuesta* (1982) 458 U.S. 141, 153 [102 S.Ct. 3014, 73 L.Ed.2d 664].) Since "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief'" (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 521 [112 S.Ct. 2608, 120 L.Ed.2d 407]), the principles of law governing federal preemption "apply with equal force whether the state law takes the form of a legislative enactment or an award of damages through private suit. [Citations.]" (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1162.)

Federal preemption can arise in the following circumstances. "'First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. . . . Finally, state law is pre-empted to the extent that it actually conflicts with federal law,'" either because "'it is impossible for a private party to comply with both state and federal requirements, [citation] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [Citations.]" (*Dowhal v. SmithKline Beecham Consumer Healthcare, supra,* 32 Cal.4th at p. 923.) It is the latter form of federal conflict preemption that is at issue in this case.

Although defendants and amici curiae on their behalf question its applicability to a case of conflict preemption, generally "'[c]onsideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."' [Citation.]" (*Dowhal v. SmithKline Beecham Consumer Healthcare, supra,* 32 Cal.4th at p. 923; *see also Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 958, fn. 12 [in implied preemption cases "[w]e discern no persuasive reason why the traditional presumption against preemption should be categorically inapplicable"].) On appeal from the dismissal of an action after the sustaining of a demurrer without leave to amend on the basis of federal preemption we apply a de novo standard of review. (*Credit Managers Assn. of California v. Countrywide Home Loans, Inc.* (2006) 144 Cal.App.4th 590, 593.)

2. The Safety Act

Congress enacted the Safety Act in 1966 "to reduce traffic accidents and deaths and injuries resulting from traffic accidents," in part, by "prescrib[ing] motor vehicle safety standards for motor vehicles and motor vehicle equipment. . . . " (49 U.S.C. § 30101(1); former 15 U.S.C. § 1381.) To accomplish this purpose, Congress directed the United States Department of Transportation (DOT) to "prescribe motor vehicle safety standards" (49 U.S.C. § 30111(a)) taking into consideration "relevant

available motor vehicle safety information[,] . . . [¶] . . . [¶] . . . whether a proposed standard is reasonable, practicable, and appropriate for the . . . type of motor vehicle or motor vehicle equipment for which it is prescribed[,] and [¶] . . . the extent to which the standard will carry out [the declared purposes] of this [Act]." (49 U.S.C. § 30111(b)(1), (3) & (4); *see also Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (1983) 463 U.S. 29, 33-34 [103 S.Ct. 2856, 77 L.Ed.2d 443].) DOT subsequently delegated the authority to promulgate these rules to the National Highway Traffic Safety Administration (NHTSA). (49 C.F.R. § 1.50(a); *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., supra,* 463 U.S. at p. 34, fn. 3.)

One of the standards promulgated under the Safety Act is FMVSS 208. It "specifies performance requirements for the protection of vehicle occupants in crashes." (49 C.F.R. § 571.208, S1 (2008).)

Originally FMVSS 208 declared that, other than the driver's side and outboard front passenger seats, a manufacturer could install either "a Type 1 [lap-only] or Type 2 [lap/shoulder] seat belt assembly . . . in each passenger car seat position." (32 Fed.Reg. 2415 (Feb. 3, 1967).) In the early 1980's, NHTSA received a petition to extend the lap/shoulder seatbelt requirement to rear seating positions. (53 Fed.Reg. 47982-47983 (Nov. 29, 1988).) NHTSA declined the request, citing compatibility issues between lap/shoulder belts and then popular child restraint systems, plus a finding "the benefits, if any, to be

gained . . . with Type 2 belts for adults would not justify the additional cost of requiring the installation of Type 2 belts in these positions." (49 Fed.Reg. 15241 (Apr. 18, 1984).)

After receiving a second petition, NHTSA reconsidered the issue and in 1988 announced a rule change extending the lap/shoulder seatbelt requirement to rear outboard seating positions of most vehicles, including multipurpose passenger vehicles. (53 Fed.Reg. 47983, 47985-47986, 47992-47993 (Nov. 29, 1988).) NHTSA supported this rule change by citing the "estimate of the costs involved with such a requirement ha[d] changed substantially . . . because of the significant increase in the number of vehicles . . . voluntarily equipped with rear seat lap/shoulder belts," a nationwide increase in seatbelt usage that rendered "the benefits of rear seat lap/shoulder belts . . . reasonably related to the costs" of their installation, and a finding that "lap/shoulder belts in the rear seat would provide better protection for children restrained in booster seats." (53 Fed.Reg. 47983, 47984 (Nov. 29, 1988).)

At the same time NHTSA considered, but rejected, a proposal to require lap/shoulder belts at rear inboard seating positions. Citing the potential need for manufacturers to make structural changes to some vehicles, the increased costs of installing lap/shoulder seatbelts, and the limited use of that seating position, NHTSA concluded the "small safety benefits" resulting from extending the lap/shoulder seatbelt requirement to rear center seating positions

did not outweigh the resulting "technical difficulties" and "substantially greater costs." (53 Fed.Reg. 47984 (Nov. 29, 1988).) Thus, when defendants manufactured plaintiffs' 1993 MPV Minivan, FMVSS 208 declared all "multipurpose passenger vehicles . . . shall meet the requirements of S4.1.2.1," which authorized either "a Type 1 [lap-only] or Type 2 [lap/shoulder] seat belt assembly," except in "forward-facing rear outboard designated seating position[s]," which "shall be equipped with an integral Type 2 seat belt. . . ." (Former 49 C.F.R. § 571.208, S4.1.2.1(b), S4.2.2, S4.2.3, S4.2.4 (1992), 53 Fed.Reg. 47992-47993.)

3. FMVSS 208's Application to This Case

The question presented here is whether FMVSS 208 preempts the present lawsuit because a common law action seeking to hold defendants liable for installing a lap-only seatbelt at a rear inboard passenger seat conflicts with the safety standard.

The Safety Act contains a preemption clause, declaring, "When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter." (49 U.S.C. § 30103(b)(1).) But this statute also contains a savings clause that states "[c]ompliance with a motor

vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." (49 U.S.C. § 30103(e).)

In *Ketchum v. Hyundai Motor Co.* (1996) 49 Cal.App.4th 1672, 57 Cal.Rptr.2d 595, a front-seat passenger was injured in a crash while wearing a two-point automatic shoulder belt without a lapbelt. The defendant argued the lawsuit was preempted because the then-applicable version of FMVSS 208 authorized this type of passenger crash protection. Describing FMVSS 208 as a "minimum standard[ ] for motor vehicle safety" (*Ketchum v. Hyundai Motor Co., supra,* 49 Cal.App.4th at p. 1679), and citing the Safety Act's savings clause, the Court of Appeal rejected the preemption claim. "In the preemption clause, Congress precludes the states from establishing or continuing any motor vehicle 'safety standard applicable to the same aspect of performance.' [Citation.] . . . The savings clause [citation] provides that compliance with a 'safety standard' issued under the Safety Act does not exempt a person from 'liability under common law.' Congress clearly distinguished between motor vehicle safety standards, which are preempted, and common law standards for liability, which are not. This language unambiguously expresses the intent of Congress to preserve common law liability actions." (*Id.* at p. 1680.)

But in *Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. 861, the Supreme Court rejected this approach. There the plaintiff suffered injury in a front-end collision. Although the vehicle was equipped

with both shoulder and lap seat belts, she sued the defendants alleging the car was defective because it lacked an airbag. The defendants argued the then-applicable version of FMVSS 208, which made installation of an airbag optional, preempted the lawsuit.

Initially, *Geier* rejected the defendants' express preemption claim by reconciling the preemption and savings clause provisions: "'[A] reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate – for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. [Citation.]'" (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at p. 868.)

Geier also announced two further holdings relevant to this case. First, it concluded "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations" (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at p. 869) and thus it "does *not* bar the ordinary working of conflict pre-emption principles." (*Ibid.*)

Second, *Geier* held "a common-law 'no airbag' action like the one before us actually conflicts with FMVSS 208." (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at p. 874.) In reaching this conclusion, *Geier* reviewed FMVSS 208's history and DOT's explanation for its decision not to require airbags in all vehicles. (*Id.* at pp. 875-880.) The court

rejected the "view [that] FMVSS 208 sets a minimum airbag standard. . . . The . . . [ ]DOT's[ ] comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices," that "would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote FMVSS 208's safety objectives. [Citation.]" (*Id.* at pp. 874-875.)

Geier thus found the regulation "'embodies the Secretary [of Transportation]'s policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.' [Citation.] Petitioners' tort suit claims that the manufacturers . . . 'had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags.' [Citation.] [¶] In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the [car]. Such a state law – *i.e.*, a rule of state tort law imposing such a duty – by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the

variety and mix of devices that the federal regulation sought. . . . Because the rule of law for which petitioners contend would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed, it is pre-empted. [Citations.]" (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at pp. 881-882.)

While *Geier* is distinguishable because it dealt with passive restraints, not seatbelts, its analysis of FMVSS 208 rejected *Ketchum's* approach in determining the preemptive effect of that safety standard. Furthermore, subsequent appellate decisions involving tort actions challenging the use of lap-only seatbelts have followed *Geier* and held these lawsuits are preempted under FMVSS 208. In *Hurley v. Motor Coach Industries, Inc.* (7th Cir. 2000) 222 F.3d 377, the court ruled a bus driver's action against the vehicle's manufacturer for installing a lap-only seatbelt was preempted. "*Geier* noted the controversy over the efficacy and utilization of airbags and seat belts and concluded that FMVSS 208 'deliberately sought variety' by leaving the choice of passenger protection system up to manufacturers. [Citation.]" (*Id.* at p. 382.) In *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, the court held FMVSS 208 preempted a design defect claim asserted by a plaintiff injured in an accident while seated in the front center seat of a truck wearing a lap-only seatbelt. (*Id.* at p. 1283.)

More apropos to this case, three other appellate decisions have applied *Geier's* approach to hold defective design lawsuits challenging an automobile manufacturer's use of a lap-only seatbelt at the inboard position of a passenger vehicle's rear seat were preempted by FMVSS 208. (*Carden v. General Motors Corp.* (5th Cir. 2007) 509 F.3d 227, 231-232; *Roland v. General Motors Corp.* (Ind.Ct.App. 2008) 881 N.E.2d 722, 727; *Heinricher v. Volvo Car Corp.* (2004) 61 Mass.Ct.App. 313 [809 N.E.2d 1094, 1098].)

These decisions considered and rejected many of the arguments raised by plaintiffs in this appeal. For example, citing the statutory definition of a motor vehicle safety standard and language appearing in the NHTSA's explanations of its rule-making decisions, plaintiffs describe FMVSS 208's regulations governing the installation of seatbelts as minimum standards. *Carden* rejected a similar claim: "A review of the regulatory and rule making history of FMVSS 208 supports the conclusion that the NHTSA's decision to allow car manufacturers the option to install either lap-only or lap/shoulder seat belts in the rear center seating position of passenger vehicles was deliberate, and the agency identified specific policy reasons for its decision. . . . [W]hen FMVSS 208 was initially promulgated, the DOT required either lap-only or lap/shoulder seat belts in each seating position in passenger vehicles. [Citation.] As technology advanced and seatbelt use became more widespread, seatbelt requirements evolved. In 1989, noting the decreased cost and increased use of seatbelts in rear

seating positions, the NHTSA amended FMVSS 208 to require the use of lap/shoulder seat belts in rear outboard seating. [Citation.] The commentary preceding the final rules indicates that the NHTSA considered comments suggesting that lap/shoulder seat belts be required in the rear center seating position as well, but decided to leave manufacturers the option to select between lap-only and lap/shoulder belts. [Citation.] In excluding the rear center seat from this requirement, the agency explained that 'there [were] more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task.' [Citation.] Based on this language, it is clear that the agency's decision was deliberate and based on managing technological constraints and cost efficiency." (*Carden v. General Motors Corp., supra,* 509 F.3d at pp. 231-232, fns. omitted.)

Plaintiffs also assert that "[u]nlike *Geier,* this case does *not* involve airbags, passive restraint devices, or the unique policy judgments made by NHTSA when it promulgated the . . . version of FMVSS 208 governing passive restraints." *Griffith* rejected the argument that *Geier* was limited to lawsuits involving a manufacturer's choice between passive restraint options. "[T]he Supreme Court . . . framed the issue as one of intent. In implementing

the Congressional mandate to reduce the number of vehicular deaths, did DOT intend to establish only certain minimum safety standards, beyond which a state would be free to require more, or did it deliberately design a regulatory scheme which provides specific passenger restraint options, no one of which would state law be free to foreclose? [¶] In *Geier*, the Court found that the rule-making history of FMVSS 208 makes clear that DOT saw it not merely as a minimum standard, but as a comprehensive regulatory scheme. [Citation.] DOT intended and expected FMVSS 208 to produce a mix of restraint devices, both passive and manual, in cars and trucks. [Citation.] DOT's own contemporaneous explanation of FMVSS 208 was that it believed this mix would maximize the likelihood that people would actually use the passenger restraint systems installed in their cars and trucks. [Citations.]" (*Griffith v. General Motors Corp., supra,* 303 F.3d at pp. 1280-1281, fn. omitted; *see also Roland v. General Motors Corp., supra,* 881 N.E.2d at p. 727 ["NHTSA's regulation of seat belt use was motivated by the same policy concerns . . . identified in *Geier* as the basis for the agency's decision to permit various passive restraint options: safety and consumer acceptance (with respect to child restraints), technical difficulties (including issues as to anchor locations and possible interference with the rear view mirror), and lowering costs to encourage technological developments"].)

A third argument plaintiffs assert is that this case is governed by the United States Supreme

Court's later decision in *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51 [123 S.Ct. 518, 154 L.Ed.2d 466]. *Sprietsma* arose from the death of a woman after she fell off a boat and was struck by the blades of the boat's outboard motor. Her husband sued the motor's manufacturer, alleging the product was unreasonably dangerous because it lacked a propeller guard. In state court, the defendant succeeded in having the lawsuit dismissed on the ground it was preempted under the Federal Boat Safety Act of 1971 (46 U.S.C. § 4301 et seq.) because the United States Coast Guard, which had the authority to issue regulations under the Act, had studied the issue and chosen not to adopt a regulation requiring the installation of propeller guards.

The United States Supreme Court reversed. In response to the defendant's claim of implied preemption arising from the Coast Guard's inaction, it noted, "The Coast Guard's decision *not* to impose a propeller guard requirement presents a sharp contrast to the decision of the Secretary of Transportation that was given pre-emptive effect in *Geier*. . . ." (*Sprietsma v. Mercury Marine, supra,* 537 U.S. at p. 67.) Thus "[i]t is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation. The decision . . . to 'take no regulatory action,' [citation], left the law applicable to propeller guards exactly the same as it had been before the subcommittee began its investigation. . . . [¶] Indeed, history teaches us that a Coast Guard decision not to

regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards." (*Id.* at p. 65.)

As explained in *Carden v. General Motors Corp., supra,* 509 F.3d 227, "*Sprietsma* involved a complete absence of regulatory action, which was not the case here. As discussed above, the [NHTSA] identified particular policy reasons for its decision to allow manufacturers the option of selecting between the two seat belt designs, and included this option as a part of a comprehensive regulatory scheme. [Citation.] Thus, *Sprietsma* does not control." (*Id.* at p. 232; *see also Roland v. General Motors Corp., supra,* 881 N.E.2d at pp. 728-729.)

Plaintiffs also claim *Sprietsma* stands for the proposition that NHTSA's "analysis of technical feasibility, costs, and relative safety benefits" does not "reflect any authoritative message of federal policy against lap/shoulder belts in rear-center seats." This argument misstates the Supreme Court's opinion in *Sprietsma.* After quoting the Coast Guard's explanation for rejecting a propeller guard requirement and discussing the reasons given by that agency, the court concluded "although the Coast Guard's decision . . . was undoubtedly intentional and carefully considered, it does not convey an 'authoritative' message of a federal policy against propeller guards." (*Sprietsma v. Mercury Marine, supra,* 537 U.S. at p. 67.) Thus, *Sprietsma* does not bar a federal regulation from having a preemptive effect simply because the agency

employs a "cost-benefit analysis" to reach its decision. In fact, by statute, DOT and NHTSA are required to consider factors such as feasibility and cost in issuing motor vehicle safety standards. (49 U.S.C. § 30111(b)(1), (3) & (4).)

Plaintiffs also rely on *Chevere v. Hyundai Motor Co.* (App.Div. 2004) 4 A.D.3d 226 [774 N.Y.S.2d 6]. *Chevere* involved an action where a passenger, wearing an automatic seatbelt but not the available manual lapbelt, died in what the appellate division described as "an 'ordinary, easily survivable' intersection collision at no more than moderate speed . . . " in which "the adequacy of the restraint system in plaintiff's vehicle was a crucial factor in the assessment of liability against the . . . defendants." (*Id.* at p. 7.) The court rejected the defendants' preemption defense, declaring "*Geier* does not automatically exempt automobile manufacturers from liability whenever a federal regulation provides them with options as to the type of restraint system to be employed. Nothing in that decision bars allegations of strict products liability, breach of warranty and negligence in a state action. *Geier* precludes actions alleging a general failure to equip a vehicle properly, but does not preclude common-law claims against a manufacturer who has unreasonably opted to meet only minimum performance requirements [citation]." (*Ibid.*)

Chevere is questionable because the foregoing statement is conclusory and lacks any supporting analysis for its interpretation of *Geier*. In any event, *Chevere* is distinguishable. The only legal authority

the New York court cited to support its holding is a pre-*Geier* decision, *King v. Ford Motor Co.* (6th Cir. 2000) 209 F.3d 886. *King* rejected the defendants' preemption argument because the "'plaintiffs' position was not that the design choice made by defendants for protecting against frontal collisions – an automatic shoulder belt and knee bolster – was inherently defective but that the specific design was defective due to failure to use load limiters and/or change the location of the knee bolster and/or change the location of the belt anchor." (*Id.* at p. 892.)

King was premised on a theory the specific vehicle involved in the accident had a structural design flaw, not that the defendant had chosen the wrong passenger restraint option. The limited factual summary in *Chevere* suggests it may well have involved a similar theory of recovery. Furthermore, this approach is consistent with *Geier*. There, the Supreme Court recognized "[i]t is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption – say, because it would affect so few cars that its rule of law would not create a legal 'obstacle' to [FMVSS] 208's mixed-fleet, gradual objective. But that is not what petitioners claimed. They have argued generally that, to be safe, a car must have an airbag. [Citation.]" (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at pp. 885-886; *see also Jamison v. Ford Motor Co.* (S.C.Ct.App. 2007) 373 S.C. 248

[644 S.E.2d 755, 764] ["'compliance with performance criteria does not immunize manufacturers from common law liability arising from any defects in the production or design of their . . . restraint systems'"].)

Plaintiffs allege defendants defectively designed the minivan, in part, by equipping "[t]he center seating position of the middle bench seat . . . with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson. . . . " In effect, they seek to hold defendants liable for choosing the lap-only seatbelt option for the middle center seat position. If successful, plaintiffs' claim would bar motor vehicle manufacturers from employing one of the passenger restraint options authorized by FMVSS 208 because it would effectively require them to install only lap/shoulder seatbelts at inboard seating positions to avoid liability under California law. Such a result would "stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208" (*Heinricher v. Volvo Car Corp., supra,* 809 N.E.2d at p. 1098) and is therefore preempted.

The United States Supreme Court's decision in *Geier* is binding on us (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782) but, as noted, *Geier* is distinguishable because it dealt with passive restraints. The post-*Geier* cases considering FMVSS 208's preemptive effect on an automobile manufacturer's choice of passenger restraint systems are not controlling precedent in California. (*Ritschel v. City of*

Fountain Valley (2006) 137 Cal.App.4th 107, 120 [even when interpreting federal law the "'[d]ecisions of lower federal courts . . . are not binding on state courts'"]; *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077 ["Decisions of the courts of other states are only regarded as 'persuasive . . . depending on the point involved'"]; *Forsyth v. Jones, supra,* 57 Cal.App.4th at p. 782 ["'decisions of the lower federal courts, while persuasive, are not binding on us'"].) However, these cases have almost uniformly found FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option and we find their analysis to be persuasive. Therefore, we conclude that to the extent plaintiffs contend defendants are liable for failing to install a lap/shoulder seatbelt in the minivan's middle row inboard seat, their claim is barred by the version of FMVSS 208 in effect when defendants manufactured the minivan.

4. Plaintiffs' Remaining Theories of Recovery

Plaintiffs note the third amended complaint alleged other design defect claims not covered by FMVSS 208, including a lap-only belt "anchored at an unsafe angle," several "seating positions" "unreasonably susceptible to ramping and submarining of passengers" because of "[t]he angle, geometry, and composition of the seat bottom," "seat backs" incapable of "sufficiently withstand[ing] foreseeable forces in a frontal collision," and the vehicle's lack of "sufficient energy-absorbing materials and structures to

absorb reasonable amounts of force from a frontal collision. . . ." In addition, citing the principle that "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning" (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 347), plaintiffs contend their failure to warn theory is not preempted by FMVSS 208. Thus, they argue, "even if this court finds that the lap/shoulder belt theory is preempted, the judgment should still be reversed and the case remanded for further proceedings on the other remaining theories of liability."

Plaintiffs waived these claims. They stipulated to dismiss with prejudice all injury claims relating to plaintiffs Delbert and Alexa Williamson. As for Thanh Williamson's death, plaintiffs acknowledged both in the third amended complaint and at the hearing on the demurrer that without the ability to challenge defendants' failure to install a lap/shoulder seatbelt they could not proceed on the remaining theories of liability. The third amended complaint declared all "[t]he defects . . . alleged . . . were joint and concurrent causes . . . such that each defect . . . cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together." Consequently, "the injuries to Thanh Williamson were the result of all of the defects" and, "[b]ut for the presence of all of these defects, [her] injuries would not have been severe nor would she have died. . . ."

At the hearing on the demurrer, the trial judge expressed his opinion the inability to hold defendants "liable for choosing a two-point seatbelt instead of a three-point seatbelt" did not "mean that [they] couldn't state a cause of action based" on "any other tort theory." Defense counsel even agreed with this observation, stating, "We are not arguing that they are preempted from alleging that the seat[ ]back in the vehicle is defective. [¶] We're not arguing that they're preempted from saying the seat cushion is defective or the vehicle structure is defective." But in response, plaintiffs' attorney declared "with the court's ruling as it presently stands, I don't think I could put on a case on behalf of my clients," explaining "the [seat]belt is integral" to the case, and "[i]f you strike all these [defective seatbelt] allegations, I am left with nothing."

In light of the concessions contained in the third amended complaint and counsel's comments, plaintiffs' alternative theories of recovery are also barred by federal preemption. (*Carden v. General Motors Corp., supra,* 509 F.3d at p. 233 [where failure to warn and other defect claims are "premised on defective design claims found to be preempted," they are "also preempted federal law"]; *Irving v. Mazda Motor Corp.* (11th Cir. 1998) 136 F.3d 764, 769-770 [where the plaintiff "tied the claims of defective design and failure to warn together" and the "defective-design claim is preempted by FMVSS 208, there was no defect about which to warn"]; *Roland v. General Motors Corp., supra,* 881 N.E.2d at pp. 729-730

["misrepresentation and failure to warn claims" preempted where they "depend on . . . contention that a lap belt is defective and are a roundabout attempt to challenge the choice provided by FMVSS 208 as part of a comprehensive regulatory scheme"].) Therefore, the trial court properly sustained the demurrer without leave to amend as to the allegations of Thanh Williamson's injuries and death.

DISPOSITION

The judgment is affirmed. Respondents' request that we take judicial notice of portions of the Federal Register relating to FMVSS 208 is granted. Respondents are entitled to recover their costs on appeal.

CERTIFIED FOR PUBLICATION

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DELBERT WILLIAMSON et al., Plaintiffs and Appellants, v. MAZDA MOTOR OF AMERICA, INC. et al., Defendants and Respondents.	G038845 (Super. Ct. No. 04CC06494) ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT (Filed Nov. 18, 2008)

It is ordered that the opinion filed herein on October 22, 2008 be modified in the following particulars:

1. On page 9, in the first full paragraph starting with "The question presented" delete the phrase "in the center middle row" appearing in the third line and replace it with "at a rear inboard" so that the sentence reads:

"The question presented here is whether FMVSS 208 preempts the present lawsuit because a common law action seeking to hold defendants liable for installing a lap-only seatbelt at a rear inboard passenger seat conflicts with the safety standard."

2. On page 12, in the first full paragraph starting with "More apropos to this case" delete the phrase "in the center" appearing on the third line and replace it with "at the inboard" so that the sentence reads:

"More apropos to this case, three other appellate decisions have applied *Geier's* approach to hold defective design lawsuits challenging an automobile manufacturer's use of a lap-only seatbelt at the inboard position of a passenger vehicle's rear seat were preempted by FMVSS 208."

3. On page 17, in the second sentence of the first full paragraph starting with "Plaintiffs allege defendants defectively" delete the phrase "the middle center" and replace it with "a rear inboard" so that the sentence reads:

"In effect, they seek to hold defendants liable for choosing the lap-only seatbelt option for a rear inboard seat position."

4. On page 18, in the last sentence of the top paragraph starting with "federal courts . . . " delete the word "center" and replace it with "inboard" so that the sentence reads:

"Therefore, we conclude that to the extent plaintiffs contend defendants are liable for failing to install a lap/shoulder seatbelt in the minivan's middle row inboard seat, their claim is barred by the version of FMVSS 208 in effect when defendants manufactured the minivan."

The petition for rehearing is DENIED.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P.J.

IKOLA, J.

Court of Appeal, Fourth Appellate District,
Div. 3 – No. G038845

S168717

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DELBERT WILLIAMSON et al.,
Plaintiffs and Appellants,

v.

MAZDA MOTOR OF AMERICA, INC. et al.,
Defendants and Respondents.

(Filed Feb. 11, 2009)

The petition for review is denied.

Werdegar, J. was absent and did not participate.

GEORGE
Chief Justice

No. 08-1314

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,

Petitioners,

v.

MAZDA MOTOR CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION FOR RESPONDENTS MAZDA MOTOR CORPORATION AND MAZDA MOTOR OF AMERICA, INC. DBA MAZDA NORTH AMERICAN OPERATIONS

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, when the lower court's decision finding preemption under *Geier v. American Honda* does not conflict with this Court's interpretation of *Geier* in a variety of cases involving regulations other than just the 1984 version of FMVSS 208, and when Petitioners have not shown any conflicting lower court decisions concerning claims similar to the Petitioners'?

2. Whether Petitioners have presented compelling reasons to grant the Petition, when the lower court examined the regulatory history of FMVSS 208, and found that, in contrast to the Coast Guard's refusal to promulgate propeller guard regulations in *Sprietsma v. Mercury Marine*, NHTSA's rule giving automobile manufacturers a choice of rear center seat safety belt options was part of a comprehensive regulatory scheme encompassing an authoritative expression of agency policy?

3. Whether Petitioners have presented compelling reasons to grant the Petition, when the lower court's holding dismissing Petitioners' failure to warn claim was based on Petitioners' waiver of that claim, and alternatively, upon the FMVSS 208 regulatory scheme that this Court found in *Wyeth v. Levine* was dramatically more comprehensive than the Federal Food, Drug, and Cosmetic Act regulation at issue there?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Mazda Motor of America, Inc. dba Mazda North American Operations is the entity which distributed the 1993 Mazda MPV minivan at issue in this case.

Mazda Motor Corporation is the entity which manufactured the 1993 Mazda MPV, and it is the parent of Mazda Motor of America, Inc.

Ford Motor Company is the only publicly held company that owns 10% or more of the issued stock of Mazda Motor Corporation.

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44 Fed. Reg. 77,210 (Dec. 31, 1979) 11, 12

49 Fed. Reg. 15,241 (Apr. 18, 1984) 11, 14

53 Fed. Reg. 47,982 (Nov. 29, 1988) 15

54 Fed. Reg. 25,275 (June 14, 1989) 15

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58 Fed. Reg. 46,551 (Sept. 2, 1993) 13

68 Fed. Reg. 46,546 (Aug. 6, 2003) 11

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OTHER RESOURCES

Comments of Mercedes-Benz of North America, Inc., docketed as NHTSA 87-08-NO1-021 (July 30, 1987) 17

NHTSA, CHILD PASSENGER RESOURCE MANUAL 88 (Mar. 1992) 19

INTRODUCTION

Petitioners have wholly failed in their burden to present "compelling reasons" why their Petition for a Writ of *Certiorari* should be granted ("Petition"). *See* SUP. CT. R. 10. No conflict exists to justify a grant of *certiorari*.

The lower court correctly held that FMVSS 208 and the principles of *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) preempted Petitioners' claim that Respondent Mazda Motor Corporation (MC) chose wrongly when, in accord with the options afforded under NHTSA's comprehensive regulatory scheme, it equipped the rear center or "inboard" seats of Petitioners' MPV minivan with a lap belt (a "Type 1" belt) instead of a lap/shoulder belt ("Type 2").

Petitioners' argument starts with the assertion that the California Court of Appeal too broadly interpreted this Court's decision in *Geier* and that such an interpretation conflicts with other decisions. Petitioners rest their argument about *Geier* on two points: 1) *Geier* is limited to cases involving passive restraint systems and the 1984 version of Federal Motor Vehicle Safety Standard 208 (FMVSS 208), and 2) that any court's "options always preempt" view of *Geier*'s holding is in error. Petitioners' former point is inaccurate, and their latter point, even if correct, is inapplicable here.

As to the first point, Petitioners fail to cite any case holding that *Geier* is to be applied so restrictively. Moreover, Petitioners' argument is belied by numerous cases, including authorities they cited elsewhere with

approval: *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (concerning Coast Guard's decision not to promulgate propeller guard regulations), *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (labeling of a pharmaceutical), and *O'Hara v. General Motors Corp.*, 508 F.3d 753 (2007) (automotive window glazing standards under a different FMVSS). In each of those cases, rather than merely ignoring *Geier* as being limited to regulations under the 1984 version of FMVSS 208, this Court (*Sprietsma* and *Wyeth*) and the Fifth Circuit (*O'Hara*) undertook a detailed examination of *Geier*.

Petitioners also decry those courts holding that, under *Geier*, whenever a federal agency grants options for compliance, a suit alleging that the defendant chose the "wrong option" is preempted. Petitioners fail to identify which courts they believe have taken this approach rather than determining whether the options were provided to further agency policy goals. Regardless of whether Petitioners are correct – that an "options always preempt" standard is too broad – it is clear that the California Court of Appeal in fact did undertake an extensive examination of the history of FMVSS 208. Simply stated, this case is not the vehicle to challenge any perceived "options always preempt" standard.

And Petitioners also fail to show the existence of any "wrong option" cases, involving the use of lap or lap/shoulder belts, that conflict with the lower court's decision. Indeed, the cases Petitioners cited all found the "wrong option" claim was preempted.

Petitioners next argue that the lower court failed to properly apply *Sprietsma* because it relied on federal appellate authorities that allegedly limited *Sprietsma* to those circumstances where there was a complete agency failure to act. But here, the lower court did in fact examine the lengthy history of FMVSS 208's rear seat safety belt options, and did not blindly follow those authorities. As shown below, that history includes NHTSA's initial proposal to remove the seat belt options for rear seats, and then a considered decision, including several safety concerns, to retain those options for certain seats, including the one occupied by the Petitioners' decedent. NHTSA's rulemaking most certainly conveyed an authoritative policy decision. The lower court's decision was thus perfectly consistent with *Sprietsma*.

To the extent that Petitioners assert that there exists a conflict between the Fifth Circuit's decision in *O'Hara* and that same circuit's later decision in *Carden v. General Motors Corp.*, 509 F.3d 327 (5th Cir. 2007), concerning the application of *Sprietsma*, that conflict is inadequate to support a grant of *certiorari*. First, of course, neither of those decisions is the one rendered below. And second, certiorari is not the method for resolving intra-circuit conflicts. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Petitioners' third and final argument is that this Court's recent decision in *Wyeth* shows their failure to warn claim was improperly dismissed. The unique history of this matter, however, militates against granting *certiorari* on this ground, since the lower court found that Petitioners had waived that theory of

recovery when they repeatedly alleged that it was inextricably linked to their preempted products liability claims.

Even ignoring that waiver, however, Petitioners' invocation of *Wyeth* cannot revive their failure to warn claim. *Wyeth* is founded upon a rejection of the plaintiff's attempt to analogize FMVSS 208 and the enforcement of regulations under the Federal Food, Drug, and Cosmetic Act. But as even the *Wyeth* court itself noted in refusing to hold that *Geier* preempted Wyeth's claim, there is a dramatic difference between the comprehensive FMVSS 208 regulations having the force of law relied upon by *Geier* and the long-standing co-existence of federal and state regulations under the FDCA.

Petitioners simply have failed to show the requisite conflict, or the need to settle any important federal question, to justify a grant of *certiorari*.

STATEMENT OF THE CASE

I. PLEADINGS IN THE STATE TRIAL COURT: PETITIONERS ALLEGE MAZDA MOTOR CORPORATION CHOSE THE WRONG OPTION OF THE TWO REAR CENTER SEAT SAFETY BELT OPTIONS PROVIDED BY NHTSA

On June 7, 2004, Petitioners and Utah residents Delbert Williamson, Alexa Williamson, through her guardian *ad litem*, Delbert Williamson, and the estate of Thanh Williamson filed their "Complaint for Personal Injury and Product Liability and for Wrongful Death

and for Exemplary Damages" in Orange County Superior Court alleging that on or about August 14, 2002, they were all riding in a 1993 Mazda MPV minivan on State Route 89 in Utah when they were struck by a 1998 Jeep Wrangler that became detached from a motor home towing the Jeep. (AA 1-6).[1]

Plaintiffs alleged that Thanh Williamson was "riding in the middle row center seat" and "was wearing a lap belt only . . . ." (AA 2:28 - 3:1-5). Petitioners claimed that Thanh Williamson would have survived the collision but for defects which included the "lap only seat belt" in her seat position. (AA 4:26-28). Petitioners elaborated on their lap belt only claims in their first amended complaint for strict liability, negligence, intentional misrepresentation and concealment, and wrongful death and alleged there that "when the force that was generated by this collision caused her body to 'jackknife' around her defective lap belt, causing severe abdominal injuries and internal bleeding." (AA 8:7-9). The basis of liability was described as the MPV minivan being "equipped with inferior and unsafe two-point lap belts in the middle sitting positions, when it should reasonably have been equipped with three-point seat belts, as the remaining seats in the SUBJECT VEHICLE." (AA 11:1-3). Petitioners also made a specific failure to warn claim about the lap-only belt, asserting that "Mazda had knowledge . . . of the dangers of two-point lap belts and failed to warn PLAINTIFFS and other consumers of such dangers." (AA 11:14-16). These claims were repeated in a second amended complaint to

[1] As in the Petition, "AA" refers to the Appellants' Appendix presented to the California Court of Appeal.

which defendant MC moved for judgment on the pleadings, arguing, *inter alia*, that the Petitioners' lap-only belt claims were preempted under the Supremacy Clause and the United States Supreme Court decision in *Geier*, 529 U.S. 861. (AA 55-69).

Petitioners opposed the motion for judgment on the pleadings on June 22, 2006, summarizing their argument as follows:

> With this motion, MAZDA is attempting to avoid liability for its failure to install three point lap/shoulder belts in the rear center seat of its MPV minivan, *even though it knew three point belts were the safest form of seat belt technology*, simply because it complied with a *minimum* federal standard that gave car makers the *option* of installing either lap/shoulder belts or lap-only belts in that sitting position. There was no support for this proposition in either California law or the United Stated Supreme Court's decision in *Geier*.

(AA 118:13-18).

At the hearing, the trial court stated that it would "separate out the jack-knife, we will call it, aspect of the – of liability" and granted the demurrer on that point. (RT 8:11-14).[2] The Court did, however, give Petitioners leave to file a third amended complaint "just more or

[2] "RT" refers to the Reporter's Transcript on Appeal, part of the record before the California Court of Appeal.

less flushing out the idea that there were other simultaneously – simultaneous causes or basis of liability to the decedent's death." (RT 9:19 – 24). That third amended complaint, instead of "flushing out the other theories of liability," contained 17 additional paragraphs of history and argument about FMVSS 208 and *Geier* and the same allegation that the vehicle was defective because, among other reasons, it had a "lap-only belt." (AA 289).

In response to the third amended complaint, including the 17 additional paragraphs concerning the already barred lap-only belt claims, the Respondents again demurred because: a) the trial court had already determined that any defect claim based upon use of a two-point safety belt instead of a three-point belt was preempted, b) a failure to warn claim cannot be based upon a preempted claim, and c) Petitioners admitted that their entire complaint, including their failure to warn claim, was based at least in part on the MC's use of a two-point safety belt. Petitioners' combined opposition asserted that they had avoided the bar of the trial court's prior ruling since their new defect claims allegedly did "*not rest on Mazda's failure to utilize the lap/shoulder seat belt . . . .*" (AA 380:19-21) (Emphasis in original).

At oral argument, Petitioners' counsel candidly admitted that if he could "not refer to the three-point versus two point belt [claim]," he would be unable to present a case and the court "might as will give a nonsuit." (RT 25). The trial court sustained the demurrers and dismissed all of Petitioners' claims arising out of the death of Thanh Williamson without leave to

amend. (AA 531-532). Then the trial court issued an amended order sustaining the demurrers, without leave to amend, to all of the Petitioners' claims arising out of the death of Thanh Williamson. Thereafter, pursuant to the parties' stipulation, the claims arising out of the Petitioners' own personal injuries were dismissed, and judgment was entered in the Respondents' favor on plaintiffs' claims arising out of the death of Thanh Williamson. (AA 558-559).

II. THE CALIFORNIA COURT OF APPEAL FINDS CONFLICT PREEMPTION UNDER *GEIER*

Petitioners appealed the judgment to the California Court of Appeal, asserting that the trial court and other appellate courts had interpreted *Geier*, 509 U.S. 861, too broadly and had failed to account for *Sprietsma*'s alleged holding that there can be no authoritative agency policy behind a decision not to make a regulation.

The California Court of Appeal affirmed the trial court's decision after examining *Geier* and the rulemaking history therein chronicled as well as the rulemaking history as applied to safety belt options for rear inboard seats such as Thanh Williamson's. *Williamson v. Mazda Motor America, Inc.*, 167 Cal.App.4th 905; Pet. App. at 1. *Geier*, it found, was not to be narrowly applied merely to passive restraint cases. *Id.*; Pet. App. at 17 - 18. Under *Geier*, NHTSA's rulemaking history revealed a combination of safety reasons for requiring in 1989 that rear outboard seats have Type 2 belts, but that manufacturers should have the option of installing Type 1 or Type 2 belts in rear *inboard* seating positions. *Id.*; Pet. App. at 16 -17.

As such, imposing liability on Respondents because the MPV had the Type 1 belts – *i.e.*, that Respondents had chosen the wrong option – would conflict with NHTSA's policy and thus was preempted. *Id.*; Pet. App. at 14-18.

Petitioners sought a rehearing because, they asserted, they had erroneously referred to Thanh Williamson's seating position as a "center" or "middle" seat instead of an "aisle" seat. Indeed, from the initial complaint to their opening brief on appeal, Petitioners had used the terms "center" and "middle" to describe that seat. In their Answer, Respondents noted that NHTSA provided a definition of "outboard" and that other seats were "center," "middle," or "inboard" seats. Since Thanh Williamson's seat did not fit the definition of an outboard seat under 49 CFR 571.3, it was an "inboard" rear seat, *See, e.g.*, 69 Fed. Reg. 70,904 *et seq.*, and thus not subject to the Type 2 belt requirements when the MPV was manufactured. The Court of Appeal denied rehearing, but modified its opinion to change certain references from "center" seats to "inboard" seats. (Pet. App. at 28-30).

III. THE CONSTITUTIONAL PROVISIONS AND REGULATORY STANDARDS SHOWING THAT PETITIONERS' CLAIMS WERE PREEMPTED

A. Constitutional Issues

Article VI of the United States Constitution provides that the laws of the United States "shall be the Supreme Law of the land, . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Under the Supremacy Clause, any state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). This includes

common law liability, which may create just as much conflict with federal law as other types of state law. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1122 (3d Cir. 1990). It is also well-established that federal regulations have no less preemptive effect than federal statutes. *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713 (1985).

"Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday* 498 U.S. 52, 56-57 (1990) (citations and quotations omitted). In the absence of express preemption, implied preemption may exist in the form of field or conflict preemption. Conflict preemption will be found where it is "impossible for a private party to comply with both state and federal requirements" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287 (1995).

B. For 42 Years, FMVSS 208 Has Provided A Comprehensive Framework For Motor Vehicle Passenger Restraints

The general history of FMVSS 208, entitled Occupant Crash Protection, began in 1967, when the Department of Transportation (DOT) required manufacturers to "install manual seat belts in all automobiles," pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act). 15 U.S.C. §§ 1381, *et seq.*; *Motor Vehicle Mfrs. Assn of United*

States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 34-38 (1983). In its original form, FMVSS 208 required manufacturers to install combination lap/shoulder (Type 2 or "three-point") seat belt assemblies in the driver and right front passenger designated seating positions. For every other seating position, it allowed manufacturers to either lap-only (Type 1 or "two-point") or the lap/shoulder seat belt assemblies. *See* 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967) (RJN 18, 25).[3]

Over the 42-year history of FMVSS 208, NHTSA has reviewed, amended, and chosen not to amend the standard on multiple occasions. This review has included instances where the public has petitioned to seek a change in the standard. *See, e.g.*, 49 Fed. Reg. 15,241 (Apr. 18, 1984) (NHTSA denial of petition by Kathleen Weber and John W. Melvin to require Type 2 belts in all outboard rear seating positions) (AA 107 – 110)). It has included NHTSA's exercise of its own self initiative to revisit the standard. *See, e.g.*, 44 Fed. Reg. 77,210 (Dec. 31, 1979) (NHTSA proposed amendment of FMVSS 208 to improve seat belt comfort and convenience) (RJN 52-65). And it has included NHTSA's amendment of the standard when directed by Congress. *See, e.g.*, 68 Fed. Reg. 46,546 (Aug. 6, 2003) (NHTSA's proposed rulemaking to require Type 2 belts in all rear seating positions following passage of "Anton's Law") (AA 92 – 105).

The evolution of FMVSS 208 has occurred in stages. The initial discussion related primarily to increasing seat

3. "RJN" referes to the Respondents' Request for Judicial Notice, part of the record in the Court of Appeal below.

belt usage[4] and improving safety for the driver and other front seat occupants. Ultimately, this discussion led to the installation of alternative passive restraint systems[5]

[4] NHTSA had long been on record expressing its concern that mandatory installation of lap/shoulder belts in place of lap only belts would decrease the number of people who actually wear their safety belts. 35 Fed. Reg. 14,941, 14,942 (Sept. 25, 1970) (RJN 28). Convenience and comfort have been oft cited as factors which historically kept seat belt usage rates low. *See* 44 Fed. Reg. 77,210, 77,212 (Dec. 31, 1979) (RJN 54).

[5] When it became apparent that front seat occupants were not choosing to "buckle up," NHTSA "amended FMVSS 208 [in 1970] to include some passive protection requirements," including "airbags and automatic seatbelts." *Geier*, 529 U.S. at 874-875. Two years later, it "mandated full passive protection for all front seat occupants for vehicles manufactured after August 15, 1975." *Id.* Manufacturers were given the choice of continuing with passive restraints or using manual restraints coupled with an "ignition interlock device" that prevented the occupant from starting the car unless the seat belt was fastened. *Id.* A "continuous warning buzzer" was later added as an alternative to the ignition interlock. *Id.* But public outcry to these devices was so severe that Congress passed a law forbidding manufacturers to meet FMVSS 208 through these devices. *Id.*

In 1976, NHTSA "suspended the passive restraint requirements" in fear of public backlash, but they were reinstated in 1977 and amended to principally require either airbags or passive seat belts. *Id.* at 1923. These amendments were rescinded in 1981, but the Supreme Court held those rescissions unlawful. *See State Farm*, 463 U.S. 29.

In 1984, the DOT, led by then-Secretary Elizabeth Dole, amended FMVSS 208, so that it sought a mix of passive restraint

(Cont'd)

and the current requirement of airbags in the driver and right front passenger seating positions of all passenger cars today.[6]

The instant matter involves the particular discussion and changes regarding the rear occupant compartment. Providing auto manufacturers the option to install a Type 1 lap belt in the center rear or "inboard" seating positions was a carefully-weighed policy decision. It is evident from NHTSA's rulemaking process that FMVSS 208's allowance of a Type 1 lap belt in the rear inboard seat, in effect when the subject 1993 Mazda MPV was manufactured,[7] was part of a comprehensive

(Cont'd)

systems, including airbags, automatic belts, and other passive restraint devices. *Id.* at 1924. "The 1984 . . . standard also deliberately sought a gradual phase in of passive restraints." *Id.* at 1924. Therefore, the DOT only required "the manufacturers to equip . . . 10% of [the cars they]" manufactured after September 1, 1986, with passive restraints. *Id.*

[6] In 1993, NHTSA rescinded the automatic seat belt requirement and started the phase in of air bags. *See* 58 Fed. Reg. 46,551, 46,553 (1993).

[7] The version of 49 C.F.R. § 571.208, S4.2.2, in effect when the subject 1993 Mazda MPV was assembled, applied to: "[t]rucks and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less, manufactured on or after September 1, 1991 and before September 1, 1997." (RJN, no. 4). 49 C.F.R. § 571.208, S4.2.1.2 goes on to state that, "[e]xcept as provided in S4.2.4, each truck and multipurpose passenger vehicle . . . .

(Cont'd)

regulatory scheme, advancing deliberately chosen policy, and not just a minimum safety standard.

Of import to this case, the first significant discussion regarding the amendment of FMVSS 208 to mandate Type 2 lap/shoulder belts in the rear occupant compartment started in December of 1982 via a petition for rulemaking requesting that NHTSA require Type 2 lap/shoulder seatbelt assemblies in the rear outboard positions of all passenger vehicles. In 1984, the Secretary of Transportation, through NHTSA, rejected this petition, concluding that maintenance of the option to use Type 1 or Type 2 belts was integral to NHTSA's policy objectives. 49 Fed. Reg. 15,241 (Apr. 18, 1984) (AA 107 – 110).

From 1986 to 1989, NHTSA revisited FMVSS 208 when it considered proposed rulemaking to mandate lap/shoulder belts for the rear outboard seating positions of passenger cars, convertibles, light trucks and multipurpose passenger vehicles.[8] After receiving many

(Cont'd)
manufactured on or after September 1, 1991 and before September 1, 1997, shall meet the requirements of S4.1.2.1, or at the option of the manufacturer, S.4.1.2.2 or S.4.1.2.3 . . ." (RJN 4). Section 4.1.2.3.1(c) specifically provides that a Type 1 lap belt or a Type 2 lap/shoulder belt is allowed for each designated seating position other than the outboard designated seating position. (RJN 2). Together these sections expressly gave Mc the option to install a Type 1 lap belt assembly in the center positions of the 1993 Mazda MPV's rear rows.

[8] There were actually two separate amendments or steps to the final rule here. One required lap/shoulder belts in rear (Cont'd)

comments and studying the pros and cons of the proposed rule, NHTSA made a deliberate decision to continue to allow Type 1 lap belts in all rear row center seating positions. *See* 53 Fed. Reg. 47,982, 47,984-47,985 (Nov. 29, 1988) (AA 237 – 248); 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989) (RJN 67 - 78).

In 1986, NHTSA received a petition seeking a requirement that all rear seating positions be equipped with Type 2 belts. *See*, history described in step 1 of final rulemaking, 54 Fed. Reg. 25,275 (AA 251). NHTSA granted the petition in 1987 and published an advanced notice of public rulemaking (ANPRM) seeking comments on June 16, 1987. *Id.* After receiving responses from 34 commenters, NHTSA preliminarily determined that Type 2 belts in certain rear seats would be justified, and published a notice of public rulemaking. *See id.; see also* 54 Fed. Reg. 479, NPRM). That NPRM, which NHTSA described as a "comprehensive proposal," is telling. *Id.*; 54 Fed. Reg. 25,275.

(Cont'd)

outboard seating positions in most passenger cars, but continued the option of providing lap belts or lap/shoulder belts for non-outboard positions, including the center rear seating position. *See* 54 Fed. Reg. 25,275 (June 14, 1989) (AA 250 – 255).

The other required lap/shoulder belts for rear outboard seating positions in other types of vehicles, including convertibles, light trucks, and multipurpose passenger vehicles, such as the 1993 Mazda MPV minivan at issue in this case. *See* 54 Fed. Reg. 46,257, 46,257, 46,258 (Nov. 2, 1989) (RJN 67 – 78).

In that NPRM, NHTSA noted the various comments it received expressing concern about requiring Type 2 belts in rear *inboard* seats like the one utilized by Thanh Williamson. Some of the comments were described as follows in the Federal Register:

> Toyota noted in its comments that rear seating positions that are not outboard seating positions are not presently required to even have anchorages for shoulder belts. Hence, according to this comment, structural changes to vehicles would be required. Both Toyota and Volkswagen noted that the rear center seating position is the least-used seating position in cars, according to the 19 city survey sponsored by NHTSA. The American Seat Belt Council stated in its comments that lap/shoulder belts in rear center seating positions had low cost-effectiveness and little field testing. The Automobile Importers of America and several manufacturers alleged that there would be difficulties in locating the anchorage for a rear center seat shoulder belt in vehicles other than passenger car sedans. According to these comments, hatchback or station wagon models of passenger cars and the other vehicle types mentioned in the ANPRM would have to locate anchorages for rear center seat shoulder belts either in the loadspace floor or on the vehicle roof. According to these commenters, these locations would result in disruptions of the vehicle's cargo carrying area or impede the driver's rearward vision.

> The agency has tentatively concluded that it should limit the proposed requirement for lap/shoulder belts in rear seats to outboard seating positions *only*. The agency agrees with those commenters that asserted that there would be more technical difficulties associated with a requirement to install lap/shoulder belts at all rear seating positions, than with a requirement to install lap/shoulder belts only at rear outboard seating positions. Whether or not those difficulties could be overcome, there would be small safety benefits and substantially greater costs if rear seating positions that are not outboard seating positions were required to have lap/shoulder belts.

AA 239 – 240, 53 Fed. Reg. 47,984.

Another comment, not specifically mentioned in the NPRM, was Mercedes-Benz's statement that, "[d]ue to the extremely low occupancy-rate of the rear-center seat by adults, plus an improved suitability for fastening child restraint systems, the rear-center seating positions are equipped with lap belts." *See* Comments of Mercedes-Benz of North America, Inc., docketed as NHTSA 87-08-NO1-021, at 1 (July 30, 1987).

Obviously, these varied concerns referenced in the NPRM included numerous safety-related issues. No matter how NHTSA later described the group of these concerns, including the term "technical difficulties," it is clear these issues influenced the final rule, the second part of which was issued on November

2, 1989, and resulted in NHTSA offering manufacturers a choice to use Type 1 or Type 2 belts in rear center or "inboard" seats. 54 Fed. Reg. 46,258. As NHTSA said:

> The agency explained in the NPRM that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task. Accordingly, this rulemaking excluded further consideration of a requirement for center rear seating positions. None of the commenters presented any new data that would cause the agency to change its tentative conclusion on the subject that was announced in the NPRM.

Id.

Petitioners make much of the final rulemaking and NHTSA's use of the term "technical difficulties," implying that they do not encompass "safety" concerns. When viewed in context, showing that term was a short description of NHTSA's various concerns, including numerous safety concerns, it is clear that safety was one of the prime reasons why NHTSA chose to maintain the Type 1 or Type 2 option for rear center seats.

Even well after the 1989 rulemaking, and before the Mazda MPV was manufactured, NHTSA continued to discuss safety concerns about Type 2 belts in rear center

seats. *See, e.g.*, NHTSA, CHILD PASSENGER RESOURCE MANUAL 88 (Mar. 1992) (stating that the "center rear seating position," which almost always has a lap belt, "often has a belt that is tightened by hand and therefore usually poses fewer compatibility problems [for child restraints].").

There can be little doubt that, as part of its comprehensive scheme for regulating the types of safety belts used, NHTSA's decision to permit Type 1 or Type 2 belts for rear center or "inboard" seating position was a deliberate policy step made as part of NHTSA's implementation of the Safety Act and designed to promote safety.

REASONS FOR DENYING THE PETITION

I. PETITIONERS FAIL TO SHOW THE LOWER COURT'S APPLICATION OF *GEIER* TO PREEMPT THE "WRONG OPTION" CLAIM HERE CONFLICTS WITH THIS COURT'S VIEW OF *GEIER*, OR THE DECISIONS OF OTHER COURTS EVALUATING THE SAME "WRONG OPTION" CLAIM

A. Unlike Petitioners' Desired Interpretation, *Geier* is not to be Narrowly Applied

Petitioners commence their discussion with an apparent assertion that *Geier* is to be given a narrow application by the lower courts. They say it was "based solely" on the "unique" history of the 1984 passive restraint regulations under FMVSS 208 and as such, is inapplicable to this matter (or to any other case) that

does not involve the 1984 version of FMVSS 208. (Pet. at 9, 12-13).

This ultra-narrow interpretation of this Court's precedent urged by Petitioners is both lacking in support and, based upon the authorities even Petitioners cite elsewhere, illogical. As the California Supreme Court (citing this Court's decisions in *Sprietsma*, 537 U.S. 51 and *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001)) cogently explained two months' before Petitioners filed the underlying lawsuit, "*Geier* is not a narrow holding limited to automobile safety standards; instead it established a general rule upholding conflict preemption even if the applicable federal law contains a savings clause." *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal.4th 910, 925-926 (2004) (citing *Spriestma* at 63 and *Buckman Co.* at 352).

Were *Geier* to be narrowly applied, its precedential value would be so limited that courts, including this Court, would expend little time exploring its relevance to cases involving medical devices, boat propellers, and automobile window glass. In those cases, the court could merely say that, since the 1984 version of FMVSS 208 is not being cited, *Geier* has no effect.

Of course, even authorities relied upon by Petitioners, such as *Sprietsma*, *Wyeth*, and *O'Hara*, all went through detailed analyses to differentiate their facts and regulations from *Geier*. Had this Court and the Fifth Circuit believed that *Geier* was a narrow holding, there would have been little need for such an evaluation. Instead, those decisions could have summarily disposed of *Geier* by holding that it applies only to the 1984 version of FMVSS 208.

B. As the Lower Court Undertook an Analysis of the Policy Reasons Behind the Safety Belt Options For Rear Inboard Seats, This Case is not the Proper Vehicle to Address the Alleged "Options Always Preempt" Standard

In addressing Petitioners' claims below and the Respondents' preemption defenses, the California Court of Appeal undertook a detailed examination of FMVSS 208 as it related to the rear inboard and outboard seating positions. (Pet. App. at 8 – 11). After that analysis, it then recited and examined the very portions of *Geier* urged as critical by Petitioners – the findings that the passive restraint regulations of FMVSS 208 embodied NHTSA's policy objectives. (Pet. App. at 12 – 15). Only then, after it separately reviewed the rear inboard regulatory history, and the mandates of *Geier*, did the California Court of Appeal find that certain federal decisions, such as *Carden v. General Motors Corp.*, 509 F.3d 227 (5th Cir. 2007) and *Roland v. General Motors Corp.*, 881 N.E.2d 722 (Ind. App. 2008), were persuasive. In other words, the lower court's opinion, far from showing an unquestioned allegiance to the federal court cases, expressed the court's own analysis as to why *Geier* applied and mandated that Petitioners' claims were preempted.

Against the backdrop of the California Court of Appeal's detailed analysis, Petitioners' second point in their Petition, that the "broad 'options always preempt' interpretation of *Geier* is directly contrary to the statutory scheme enacted by Congress," is curious. (Pet. at 14). By this point, Petitioners imply that the decision below is in fact an "options always preempt"

ruling, which it clearly is not. Also, Petitioners fail to specifically identify those cases that Petitioners assert were based on the "options always preempt" theory and deserve this Court's attention. (Pet. at 13 – 14). Petitioners merely ambiguously use "these cases" without identifying them.[9]

Ample evidence exists to show that NHTSA policy objectives permeated its rulemaking concerning belting options for rear inboard seats like those at issue on the subject Mazda MPV minivan. As such, this case is not one guided by a supposed "options always preempt" rule. Thus, even were there cases governed by such a rule, the instant case does not provide the appropriate vehicle to address those cases.

C. Petitioners Failed to Show any Conflict with Other Cases Finding Preemption of Rear Center Seat "Wrong Option" Claims

Although Petitioners claim that the interpretation of *Geier* conflicts with other courts, they failed to identify any courts that have decided the same issue – whether FMVSS 208 preempts rear center seat "wrong option" claims – that are in conflict.

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[9] Respondents suspect that Petitioners are referring at least to *Carden*. The *Carden* plaintiffs made the same assertion – that the appellate court relied merely on the option provided by the FMVSS and thus failed to do "the in-depth analysis" of FMVSS 208 – in their Petition for a Writ of *Certiorari* to this Court. (Docket No. 07-1302, p. 13). That petition was denied on June 9, 2008.

The two cases Petitioners do cite, *Chevere v. Hyundai Motor Co.*, 774 N.Y.S.2d 6 (2004) and *O'Hara*, 508 F.3d 753, are easily distinguishable. First, neither case involved the wrong option issue presented below, *to wit*, whether a manufacturer could be held liable for using Type 1 belts in a rear center seat instead of a Type 2 belt. As discussed more fully below, *O'Hara* involved automobile window glazing standards under FMVSS 205. *Chevere* involved a plaintiff's use of an automatic safety belt but not the available manual seat belt. Furthermore, as the lower court noted, the *Chevere* court refused to apply *Geier* on the strength of a pre-*Geier* decision involving a structural design flaw. Petitioners here have not made any such structural design flaw claim.

II. SINCE THE PREEMPTION DECISION BELOW RELIED ON A REGULATION THAT WAS PART OF A COMPREHENSIVE, AUTHORITATIVE AGENCY POLICY, THERE IS NO CONFLICT WITH *SPRIETSMA*

Attempting to manufacture a conflict where none exists, petitioners assert that "the California Court of Appeal followed a recent line of cases holding that *Sprietsma* is strictly limited to situations involving a 'complete absence of regulatory action.'" (Pet. at 20) (citing *Carden* and *Roland*). As the California Court of Appeal noted, however, the *Carden* court's application of *Sprietsma* was not so shallow, but was instead based upon a finding that the FMVSS 208 regulation before it

– unlike the Coast Guard's lack of regulation – was part of long-standing agency policy:

> As explained in *Carden*, "*Sprietsma* involved a complete absence of regulatory action, which was not the case here. As discussed above, the [NHTSA] identified particular policy reasons for its decision to allow manufacturers the option of selecting between the two seat belt designs, and included this option as a part of a comprehensive regulatory scheme. 509 F.3d at 232. Thus, *Sprietsma* does not control." *Id.* at 232; *see also Roland*, 881 N.E.2d at 728-729.

Williamson, 167 Cal.App.4th at 917, Pet. App.

Absence of regulatory action, then, seemingly signifies the absence of agency policy reasons for failing to issue propeller regulations in *Sprietsma*. As Petitioners admit, *Sprietsma* involved the lack of "any 'policy' judgment" by the Coast Guard on propeller guards. (Pet. at 19). In contrast, *Carden* correctly found and cited the policy reasons behind NHTSA's decision to permit Type 1 or Type 2 belts in rear center seats of multipurpose passenger vans.

In their *Sprietsma* analysis, Petitioners aver that NHTSA's decision concerning rear center seating positions was a mere "cost-benefit analysis." Petitioners must make this argument to promote a comparison to the facts of *Sprietsma*. But Petitioners' assertion that NHTSA's decision concerning rear center seat belts was

"indistinguishable from the Coast Guard's reasoning discussed in *Sprietsma*," *id.*, is not supported by the facts.

As shown above, NHTSA had a panoply of safety concerns underlying its policy to permit Type 1 belts in rear center seating positions. And the *Carden* and *Roland* courts each concluded that the "technical difficulties" cited by NHTSA (and quoted by Petitioners here) involved safety concerns, and not just a cost-benefit analysis.

These policy decisions and the history of FMVSS 208 show that neither *Altria v. Good*, 129 S. Ct. 538 (2008), nor *O'Hara*, 508 F.3d 753, invalidate the lower court's evaluation of *Sprietsma*, or that a different result is warranted. In *Good*, given minimal treatment by the Petitioners, this Court addressed a claim that certain cigarette manufacturers' sale of "light" cigarettes violated a state unfair practices act, and the manufacturers' defense that the claims were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). In particular, the manufacturers asserted that "the FTC [Federal Trade Commission] has for decades promoted the development and consumption of low tar cigarettes and has encouraged consumers to rely on representations of tar and nicotine based on Cambridge Filter Method testing . . . ." *Good*, 129 S. Ct. at 549.

In rejecting the preemption defense, this Court noted that the FTC's enforcement of the FCLAA was not marked by any "longstanding policy authorizing collateral representations based on Cambridge Filter Method test results." *Id.* at 550. Indeed, the Court noted

that the FTC had sometimes "prevented misleading representations of Cambridge Filter Method test results." Then, before mentioning *Sprietsma* for the sole time in the majority opinion, this Court stated that any failure by the FTC to force correction of the representations re "light" cigarettes cannot be sufficient evidence of an agency policy to support preemption. Citing *Sprietsma*, and the Coast Guard's "decision not to regulate propeller guards," it held that "agency nonenforcement of a federal statute is not the same as a policy of approval." *Id.* at 550 (citing *Sprietsma*, 537 U.S. 51) (footnote omitted).

Although the *Good* court did not discuss *Geier* or FMVSS 208, the contrast between the comprehensive scheme in FMVSS 208 and the FCLAA is apparent.

In *O'Hara*, the specific distinction between FMVSS 208 and the regulation involved there was explored. O'Hara alleged that she was partially ejected from a vehicle during a low-speed rollover accident, and that she would not have been injured had the vehicle been equipped with window glass treated with advanced glazing instead of being tempered. *O'Hara*, 508 F.3d at 755. In its pre-emption analysis, the *O'Hara* court noted the sharp contrast between the safety standard before it, FMVSS 205, and the safety standard in *Geier* (and in this instant petition), FMVSS 208.

First, the Court looked at the text of FMVSS 205, and found that it was simple and straightforward. *Id.* at 759. Containing glazing and materials specifications, the *O'Hara* court described FMVSS 205 as a "materials standard that sets a safety 'floor' to ensure that the

glazing materials used by manufacturers meet certain basic requirements." *Id.* at 760. The *O'Hara* court then noted, in contrast, that FMVSS 208 contains detailed timelines and safety testing requirements and found that it had "carefully constructed safety restraint options." *Id. O'Hara* did not limit this evaluation to the airbag standards examined in *Geier*. In fact, it cited *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377 (7th Cir. 2000) (finding pre-emption of a bus driver's claim that lap-only belt was defective), as another example involving implementation of NHTSA's carefully constructed safety plan. *Id.*

By contrast, the *O'Hara* court found that the FMVSS 205 standard lacked all the indicia, including "'options' language,'" of "federal policy." *Id.* Similarly, the Court found the commentary on FMVSS 205, especially when compared to FMVSS 208, to be wanting. The final commentary on the version of FMVSS 208 at issue in *Geier* was replete with agency policy and concerns; FMVSS 205, in contrast, failed entirely to "discuss NHTSA's rollover protection policies." *Id.* at 761.

Finally, the *O'Hara* court looked at NHTSA's "Notice of Withdrawal," whereby it announced an intention to refrain from any further rulemaking on advanced glazing. The *O'Hara* court summarized the Notice as emphasizing "the existence of other promising rollover protection technologies and NHTSA's need to devote resources to developing procedures to test them," and found that, it "'does not convey an authoritative message of a federal policy against' advanced glazing in side windows." *Id.* 763-764 (citing *Sprietsma* at 67).

In short, nothing in *Good* or *O'Hara* supports an assertion that the California Court of Appeal wrongly evaluated *Sprietsma* and the impact of FMVSS 208. NHTSA's comprehensive regulatory scheme, and the numerous policy reasons for maintaining the lap or lap/shoulder belt option at the time the MPV was manufactured 17 years ago, show that *Sprietsma* is not controlling.

III. THERE IS NO CONFLICT WITH *WYETH*, GIVEN THE COMPREHENSIVE REGULATORY SCHEME IN FMVSS 208, AND PETITIONERS' WAIVER BELOW OF THEIR FAILURE TO WARN CLAIMS

Petitioners assert that this Court's recent decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), confirms that Petitioners' failure to warn claims should not have been dismissed by the state Court of Appeal. Petitioners' argument is fatally flawed, for two distinct but equally powerful reasons.

First, further showing why this case is not appropriate for this Court's review, the Petitioners waived the failure to warn claims. (Pet. App. 25-26). Petitioners admitted twice that, with the trial court's finding that the product liability claims were preempted, "they could not proceed on the remaining theories of liability." (Pet. App. at 25). These theories included a failure to warn claim. *Id.* at 26 (citing *Carden*, 509 F3d at 233).

Second, *Wyeth* concerned an FDCA regulation with a factual and regulatory history wholly distinct in character from the FMVSS 208 regulation construed in *Geier*. *Wyeth*, 129 S. Ct. at 1203. In contrast to the situation in *Geier*, the *Wyeth* court noted that, in reviewing the FDCA, it had "no occasion . . . to consider the pre-emptive effect of a specific agency regulation bearing the force of law." 129 S. Ct. at 1203.

No similar deficiency marked the regulation than California Court of Appeal evaluated here. As in *Geier*, the lower court, and the various other courts deciding similar cases, had the benefit of the complex FMVSS 208 regulatory scheme concerning rear center seat belt options. That scheme is radically different than the one presented in *Wyeth*. *Wyeth* simply is inapplicable.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

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No. 08-1314

In the Supreme Court of the United States

DELBERT WILLIAMSON, ET AL., PETITIONERS

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

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QUESTIONS PRESENTED

1. Whether the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act), 49 U.S.C. 30101 *et seq.*, or Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. 571.208, preempts a state common-law tort claim that an automobile manufactured in 1993 was defectively designed because it lacked a Type 2 (lap/shoulder) seatbelt in one of its seating positions.

2. Whether the Safety Act or FMVSS 208 preempts a state common-law tort claim that an automobile manufacturer should have warned consumers of the known dangers of a Type 1 (lap-only) seatbelt installed in one of the seating positions in one of its vehicles.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

Petitioners are the estate and survivors of Thanh Williamson. They filed this action against respondents Mazda Motor Corporation and Mazda Motor of America, Inc., the manufacturers of their minivan, alleging that respondents are liable under California common-law tort principles for Ms. Williamson's death from injuries sustained in a car accident. The state trial court granted respondents' demurrer on the ground that petitioners' state common-law tort suit is preempted by a federal regulation, Federal Motor Vehicle Safety Standard

(FMVSS) 208. The Court of Appeal of California affirmed, Pet. App. 1-27, and the Supreme Court of California denied discretionary review, *id.* at 31.

1. The National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act), now codified at 49 U.S.C. 30101 *et seq.*, requires the Secretary of Transportation to "prescribe motor vehicle safety standards," which are "minimum standard[s] for motor vehicle or motor vehicle equipment performance." 49 U.S.C. 30102(a)(9), 30111(a), see 49 U.S.C. 30101(1). The Secretary has delegated the authority to promulgate safety standards to the National Highway Traffic Safety Administration (NHTSA), an operating administration in the Department of Transportation (DOT). See 49 C.F.R. 1.50(a).

The Safety Act includes a savings clause, providing that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. 30103(e). Although the Safety Act also includes an express preemption provision, which precludes state and local governments from "prescrib[ing] or continu[ing] in effect" their own standards if those standards differ from an applicable FMVSS, 49 U.S.C. 30103(b)(1), this Court has held that the savings clause removes common-law tort actions from the scope of the express preemption clause. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 868 (2000).

This case concerns FMVSS 208, 49 C.F.R. 571.208, which is entitled "Occupant crash protection" and which "specifies performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. 571.208(S1). NHTSA issued the original version of FMVSS 208 in 1967, as part of the initial motor vehicle safety standards called for by the Safety Act. 32 Fed. Reg. 2408, 2421 (1967). Since its inception, FMVSS 208 has included a

requirement to install seatbelts in passenger cars. See *id.* at 2415.

FMVSS 208 refers to two different types of seatbelts. A Type 1 seatbelt is a lap-only seatbelt, "for pelvic restraint." 49 C.F.R. 571.209(S3). A Type 2 seatbelt is a lap and shoulder belt, "a combination of pelvic and upper torso restraints." *Ibid.* The first version of FMVSS 208 required that Type 2 seatbelts be installed for the driver's and right front passenger's seats, and that either Type 1 or Type 2 seatbelts be installed for all other seats. See 32 Fed. Reg. at 2415.

NHTSA has amended FMVSS 208 several times since 1967. At issue in this case is a requirement added in 1989 to specify the types of seatbelts required for rear seats. The 1989 amendments required manufacturers to install Type 2 (lap/shoulder) seatbelts in all "forward-facing rear outboard designated seating positions," but continued to allow manufacturers to install either Type 1 (lap-only) seatbelts or Type 2 (lap/shoulder) seatbelts in all non-outboard positions. 53 Fed. Reg. 47,982-47,993 (1988) (notice of proposed rulemaking) (NPRM), 54 Fed. Reg. 25,275-25,279 (1989) (final rule applicable to passenger cars), *id.* at 46,257-46,268 (1989) (final rule applicable to other vehicles, including the multipurpose passenger vehicle at issue here).

An "[o]utboard designated seating position" was defined as a seat less than 12 inches from the side interior wall of the vehicle. 49 C.F.R. 571.3(b) (1990). A "[r]ear outboard designated seating position," in turn, was defined as any such position "that is rearward of the front seat(s)," unless it is "adjacent to a walkway located between the seat and the side of the vehicle, which walkway is designed to allow access to more rearward seating positions." 49 C.F.R. 571.208(S4.2.4.1(b)) (standard

for light trucks and multipurpose passenger vehicles); accord 49 C.F.R. 571.208(S4.1.4.2(c)) (same, for passenger cars). Thus, under FMVSS 208 as amended in 1989, Type 2 seatbelts were not required in rear seats adjacent to a walkway or in rear center seats. This case involves a rear seat adjacent to a walkway.[1]

2. On August 14, 2002, the Williamson family, consisting of father Delbert, mother Thanh, and daughter Alexa, was traveling in a 1993 Mazda MPV minivan, which FMVSS 208 treats as a multipurpose passenger vehicle. Pet. App. 3, see 49 C.F.R. 571.3(b) (1990). The Mazda MPV has three rows of seats: the front row, with physically separate seats for the driver and a front passenger, the middle row bench, with two seats and an aisle on the right-hand side that allows access to the last row, and the last row bench, with three seats. Delbert was driving and wearing a Type 2 (lap/shoulder) seatbelt. Alexa was sitting directly behind him in the middle-row left outboard seat of the vehicle, also wearing a Type 2 seatbelt. Thanh was sitting in the middle row to Alexa's right. Because that seat was adjacent to the aisle, it was a "non-outboard rear seating position" under FMVSS 208. Thanh wore the Type 1 (lap-only) seatbelt installed by Mazda in that seating position, as FMVSS 208 permitted at the time. Pet. App. 3.

The Williamsons' vehicle collided with another vehicle, and Thanh sustained fatal injuries. Pet. App. 3.

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[1] The standard at issue in this case is no longer in effect for new cars. In response to a congressional directive, see Anton's Law § 5, 49 U.S.C. 30127 note, NHTSA revised its rule to require all passenger cars and multipurpose passenger vehicles with a gross vehicle weight rating of 10,000 pounds or less, if manufactured on or after September 1, 2007, to include Type 2 seatbelts at all rear designated seating positions that face forward. 49 C.F.R. 571.208(S4.1.5.5) and (S4.2.7.1).

Petitioners allege that "the forces generated by th[e] collision caused [Thanh's] body to 'jackknife' around her defective lap[ ]belt, causing severe abdominal injuries and internal bleeding." *Ibid.* (first and third brackets in original).

3. Petitioners sued respondents in California state court, asserting state common-law tort claims. As relevant here, they alleged that the 1993 Mazda MPV was defective because respondents should have installed a Type 2 seatbelt in Thanh's seating position. They also alleged that respondents had failed to provide adequate warnings of the known hazards, risks, and dangers of the Type 1 seatbelt installed in Thanh's seating position. Pet. App. 4. Respondents filed a demurrer on the ground that federal law preempted those tort claims. *Id.* at 5.

The trial court sustained the demurrer. The court held that federal law precluded a state law tort action "to the extent [the] theory of liability [was] the lap[-] only seat belt." Pet. App. 4 (brackets in original). The court noted that its ruling did not preclude petitioners from stating a cause of action for "negligen[ce] in how you hooked [the seatbelt] up or negligen[ce] in how you design the seat that was going to accommodate it, or any other tort theory." *Id.* at 5 (first and third brackets in original). Petitioners stated to the trial court, however, that they were "left with nothing" if federal law preempted their challenge to the type of seatbelt respondents installed in Thanh's seating position. *Id.* at 6. The parties then stipulated to dismiss petitioners' remaining claims with prejudice. *Ibid.*

4. The Court of Appeal of California affirmed. Pet. App. 1-27.

a. With respect to petitioners' design-defect claim, the state appellate court's analysis of the preemption issue focused on this Court's decision in *Geier*, *supra*. This Court held in *Geier* that an earlier version of FMVSS 208 preempted common-law tort claims that manufacturers should have equipped vehicles with driver's-side airbags. At issue was the 1984 amendment to FMVSS 208, see 49 Fed. Reg. 28,962-29,010 (1984), which required manufacturers to equip some vehicles with passive restraints. Passive restraints are devices—such as airbags or automatic seatbelts—the effectiveness of which does not depend on any action by the vehicle occupants. The 1984 regulation provided that, after a phase-in period, manufacturers could choose either to install airbags or to install other forms of passive restraints.

This Court held that FMVSS 208 conflicted with a suit alleging that a common law duty of care required installation of airbags and, therefore, preempted the suit under ordinary principles of conflict preemption. 529 U.S. at 874 886.[2] The Court explained that DOT, in promulgating FMVSS 208, "deliberately sought variety—a mix of several different passive restraint systems." *Id.* at 878. For local tort law to provide that a manufacturer's choice to install passive restraints other than airbags amounted to negligence, the Court reasoned, "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881.

In this case, the state appellate court acknowledged that *Geier* was "distinguishable because it dealt with

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[2] The Court rejected the contention that the savings clause forbids the application of ordinary conflict preemption principles. 529 U.S. at 869 874.

passive restraints, not seatbelts." Pet. App. 15, accord *id.* at 23. But the court found "persuasive" the reasoning of several lower-court decisions applying *Geier*'s reasoning to cases involving Type 1 seatbelts. *Id.* at 24. Those decisions concluded that FMVSS 208 reflected "NHTSA's decision to allow car manufacturers the option to install either lap-only or lap/shoulder seat belts" at the relevant seating positions—*i.e.*, "the same policy concerns . . . identified in *Geier*." *Id.* at 16, 18 (quoting *Curden* v. *General Motors Corp.*, 509 F.3d 227, 231 (5th Cir. 2007), cert. denied, 128 S. Ct. 2911 (2008), and *Roland* v. *General Motors Corp.*, 881 N.E.2d 722, 727 (Ind. Ct. App.), transfer denied, 898 N.E.2d 1218 (Ind. 2008) (Table)). Following the reasoning of those decisions, the court of appeal held that accepting petitioners' claim "would bar motor vehicle manufacturers from employing one of the passenger restraint options authorized by FMVSS 208," and that petitioners' claim therefore is preempted as "an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208." *Id.* at 23 (citation omitted; brackets in original).

b. The court of appeal also affirmed the dismissal of petitioners' other claims, including their failure-to-warn claim. Pet. App. 25-27. The court held that petitioners had "waived these claims" through both their stipulation and their concessions in the trial court that they could not pursue any of their claims related to Thanh Williamson's death without the ability to challenge respondents' decision to install a Type 1 seatbelt in Thanh's seating position. *Id.* at 25. The court further noted that those other claims were "also barred by federal preemption." *Id.* at 26.

5. The Supreme Court of California denied petitioners' petition for review. Pet. App. 31.

DISCUSSION

The decision below is at odds with the regulatory history of FMVSS 208 and the government's longstanding position on the preemption of state common-law tort suits by Federal Motor Vehicle Safety Standards that set only minimum standards. In reaching its conclusion, the decision below gave too broad a reading to this Court's decision in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000). Several other lower courts, both federal and state, have similarly misinterpreted *Geier*, and that recurring error has led to conflicts regarding the preemptive effect of other aspects of the FMVSS (although there is not yet a square disagreement over the precise factual scenario presented here, *i.e.*, a decision not to install a Type 2 seatbelt). The lower courts' methodological error is important: it effectively deprives the Safety Act's savings clause of its proper effect; it transforms the FMVSS from a minimum standard into a definitive standard of care; and it does so contrary to the consistent position of the agency that promulgated the standards, as repeatedly expressed in the government's briefs to this Court beginning in 1990. In the government's view, therefore, the first question presented is sufficiently important and recurring to warrant this Court's review.

The state appellate court's disposition of the second question presented rests on the adequate and independent state-law ground of waiver. This Court therefore should grant the petition only as to the first question presented.

A. The Decision Below Misreads *Geier* And Misinterprets The Preemptive Effect Of FMVSS 208

The state appellate court characterized FMVSS 208 as giving manufacturers the "option" of installing either Type 1 or Type 2 seatbelts at any position for which a Type 2 seatbelt was not expressly required. Pet. App. 16 (citation omitted). As a result, the court held that state tort law is preempted under *Geier* when the state law imposes liability for choosing the less protective option. The state court's reading of *Geier* is incorrect. A Federal Motor Vehicle Safety Standard is a "minimum standard." 49 U.S.C. 30102(a)(9). Accordingly, a state common-law duty of care that effectively sets a higher minimum does not create a conflict with federal law, in the absence of specific features of a particular FMVSS that go beyond establishing a minimum standard. *Geier* held the local negligence-law duty of care preempted because the FMVSS at issue there did more than set a minimum standard. Rather, that FMVSS affirmatively encouraged the adoption of diverse forms of passive restraints, and state tort law could not be permitted to counter that encouragement by requiring that all manufacturers select the same form of passive restraint (airbags). Where, as in this case, a FMVSS manifests no affirmative intent to foster multiple options, there is no conflict of the sort that was present in *Geier*—and hence no preemption.

1. As this Court stated in *Geier*, "DOT's own contemporaneous explanation of FMVSS 208 makes clear that the 1984 version of FMVSS 208 reflected the following significant considerations": (1) "buckled up seatbelts are a vital ingredient of automobile safety", (2) "despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder

belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled"; (3) "airbags could make up for the dangers caused by unbuckled manual belts, but they could not make up for them entirely"; (4) "passive restraint systems had their own disadvantages, for example, the dangers associated with, intrusiveness of, and corresponding public dislike for, nondetachable automatic belts"; (5) "airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars"; (6) "airbags were expected to be significantly more expensive than other passive restraint devices, raising the average cost of a vehicle price $320 for full frontal airbags over the cost of a car with manual lap and shoulder seatbelts (and potentially much more if production volumes were low)," and "the agency worried that the high replacement cost [of airbags]—estimated to be $800—could lead car owners to refuse to replace them after deployment"; and (7) "the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices." *Geier*, 529 U.S. at 877-878.

Because of the confluence of these factors, in the 1984 amendment to FMVSS 208, NHTSA phased in the passive-restraint requirement and deliberately allowed manufacturers to choose among several types of passive restraints, so that a variety of passive restraints would be available on the market. NHTSA specifically had rejected a proposed "all airbag" standard because of safety concerns, arising partly from the potential for a public backlash to an airbag mandate. *Geier*, 529 U.S. at 879. As this Court explained, NHTSA concluded that allowing manufacturers to choose among passive re-

straints "would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. And it would thereby build public confidence." *Ibid.* (citing 49 Fed. Reg. at 28,990, 29,001-29,002).

2. The history of the 1989 amendments to FMVSS 208 at issue in this case reflects a manifestly different set of agency calculations.

The original 1967 version of FMVSS 208 required manufacturers to install either Type 1 or Type 2 seatbelts for all rear passenger seating positions. See 32 Fed. Reg. at 2415. In 1984, NHTSA denied a petition for rulemaking to require Type 2 seatbelts for all passenger cars' rear *outboard* seating positions. 49 Fed. Reg. at 15,241-15,242; see also 53 Fed. Reg. at 47,982. The petition for rulemaking had sought such a rule primarily to facilitate the use of a type of booster seat for children that was held in place by Type 2 seatbelts (rather than by tethers, which at the time were more widely used to secure child restraints), although the petition also noted that adult passengers could benefit from Type 2 seatbelts in rear outboard seating positions. 49 Fed. Reg. at 15,241. Rejecting the proposal, NHTSA stated that "child restraint systems and child booster seats equipped with tethers offer greater protection for children when those tethers are attached than when those seats and systems are held in place by Type 2 belts." *Ibid.* Further, although NHTSA agreed with the view that "Type 2 belts in rear seats might give some added degree of protection to adults," the agency concluded that "the benefits, if any, to be gained by replac-

ing the Type 1 belts with Type 2 belts for adults would not justify the additional cost." *Id.* at 15,241-15,242.

In 1988, NHTSA issued an NPRM revisiting its earlier decision concerning Type 2 seatbelts in rear seating positions. 53 Fed. Reg. at 47,982-47,993. The agency proposed what would become the 1989 amendments to FMVSS 208, requiring Type 2 seatbelts in all rear *outboard* seating positions in (*inter alia*) passenger cars and multipurpose passenger vehicles. *Id.* at 47,982. In the 1988 NPRM and the subsequent final rules, NHTSA explained the main reasons for its change in position since 1984. First, more people had begun to use rear seatbelts, primarily because of new state seatbelt laws. *Id.* at 47,983. Second, rear-seat Type 2 seatbelts were "even more effective" in reducing the risk of death than Type 1 seatbelts, and NHTSA expected that greater effectiveness to result in "progressively greater safety benefits" as more rear-seat occupants used their seat belts. 54 Fed. Reg. at 25,276 (final rule applicable to passenger cars); *id.* at 46,257-46,258 (final rule applicable to other vehicles). Third, many manufacturers had voluntarily installed Type 2 seatbelts in rear outboard seats, and as a result, the cost of requiring all manufacturers to do so had diminished substantially. *Id.* at 46,258. Fourth, child restraint systems had shifted away from those requiring a tether anchor. NHTSA determined that Type 2 seatbelts would "offer benefits for children riding in some types of booster seats, would have no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts, and would offer older children the same incremental safety protection" as adults. 53 Fed. Reg. at 47,988-47,989; see *id.* at 47,983; 54 Fed. Reg. at 25,276.

The 1988 NPRM also explained why NHTSA had decided not to propose requiring manufacturers to install Type 2 seatbelts for rear *inboard* seating positions. The agency stated that there would be "more technical difficulties" associated with installing Type 2 seatbelts in rear inboard seating positions than in rear outboard seating positions. 53 Fed. Reg. at 47,984. Additionally, regardless of the technical difficulties, such a requirement would yield "small safety benefits and substantially greater costs." *Ibid.* The agency acknowledged that "some aisle seating positions," such as the one at issue in this case, "may not be covered by [the] proposed requirement" to install Type 2 seatbelts, as "the seating positions next to the aisle on the right hand side of many passenger vans • • • may *not* be outboard seating positions, because they may be more than 12 inches from the inside of the vehicle." *Id.* at 47,985.

In adopting its final rule amending FMVSS 208 for multipurpose passenger vehicles, NHTSA reemphasized its rationale for not requiring Type 2 seatbelts in rear inboard seats. 54 Fed. Reg. at 46,257-46,268. The agency stated that no commenters had "presented any new data that would cause the agency to change its tentative conclusion," enunciated in the 1988 NPRM, that requiring Type 2 seatbelts in rear inboard positions would be "technical[ly] difficult[]" and "would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." *Id.* at 46,258.

NHTSA also stated in its final rule release that it had decided not to require Type 2 seatbelts for rear seating positions adjacent to an aisle, regardless whether those seats were technically "outboard" seats—*i.e.*, less than 12 inches from the side wall of the vehicle.

54 Fed. Reg. at 46,258. The agency "did not mean to suggest" that the FMVSS would require manufacturers to install shoulder belts "at seating positions where they would obstruct an aisle designed to give access to rear seating positions." *Ibid.* Significantly, however, NHTSA also stated that, "[o]f course, in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with the aisleway's purpose of allowing access to more rearward seating positions, NHTSA encourages the manufacturers to do so." *Ibid.*

Thus, in its final rule, NHTSA was not seeking to promote safety by encouraging variety in seatbelt design or fostering a mix of Type 1 and Type 2 seatbelts. To the contrary, NHTSA showed a clear preference for Type 2 seatbelts and even encouraged manufacturers to install them for inboard seating positions adjacent to an aisle (the type of seat at issue in this case). The reasons why NHTSA did not mandate Type 2 seatbelts at those positions pertained to its assessment at the time of the technological difficulties, costs, and benefits of such a requirement.

That reasoning stands in sharp contrast to the agency's reasoning with respect to airbags and other passive restraints, discussed in *Geier*. There, the agency affirmatively wished to provide for and encourage several options for passive restraints, to help achieve the ultimate purpose of the regulation—the reduction of highway deaths and injuries through the installation of passive restraints. That purpose of promoting safety by fostering a variety of passive restraint devices would have been frustrated by a state common-law duty to install airbags in all vehicles. Here, by contrast, NHTSA simply set a minimum standard of Type 1 seatbelts for

rear inboard and aisle seats, based on its assessment at the time of technical feasibility and cost-benefit analyses (which are common to virtually all NHTSA rulemakings setting an FMVSS), while still encouraging manufacturers to install Type 2 seatbelts in those seats. Thus, the existence of the purported "option" was simply the by-product of NHTSA's setting of a minimum standard.

Manufacturers always have the "option" of exceeding a minimum safety standard when NHTSA has decided not to mandate a more stringent alternative because of considerations of cost or feasibility—as NHTSA did in this case and, indeed, often does in considering regulatory alternatives. But if such an "option" alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined. *Geier* does not mandate that result, because it determined that under the Safety Act, common-law tort actions may proceed unless they conflict with a FMVSS, and here, there is no conflict.

3. The government has consistently maintained that a minimum safety standard provided in a FMVSS, without more, does not conflict with a stricter state requirement. As this Court explained in *Geier*, because DOT has a "thorough understanding of its own regulation and its objectives" and a "unique[]" perspective on whether state requirements conflict with federal standards, "the agency's own views should make a difference" in the conflict-preemption analysis. 529 U.S. at 883 (citation omitted); accord, *e.g.*, *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1201 (2009) (noting that agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle'"); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 67-68 (2002); see also

Bates v. *Dow Agrosciences LLC*, 544 U.S. 431, 455 (2005) (Breyer, J., concurring). The reasoning of the decision below conflicts with the consistent position of the United States, expressed in three amicus briefs filed in this Court beginning in 1990. Those briefs maintained that a FMVSS permitting a manufacturer to choose among different options consistent with a minimum standard does not alone preempt state common-law tort claims seeking to impose liability for selecting one option instead of another.

In its brief in *Wood* v. *General Motors Corp.*, 494 U.S. 1065 (1990), submitted at this Court's invitation, the United States stated that "the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted." U.S. Amicus Br. at 15, *Wood*, *supra* (No. 89-46). The United States reiterated that position in its amicus brief in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), which stated that the government did "not agree" with the "broader theory of implied preemption" that some lower courts had advanced—"*i.e.*, that the existence of 'options' to comply with [FMVSS] 208 in itself precludes state court judgments based on the failure to install one particular option." U.S. Amicus Br. at 29 n.16, *Freightliner Corp.*, *supra* (No. 94-286). And the United States' amicus brief in *Geier* itself echoed that position: "We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose." U.S. Amicus Br. at 21 n.18, *Geier*, *supra* (No. 98-1811). See also *Geier*, 529 U.S. at 883 ("DOT has explained FMVSS 208's objec-

tives, and the interference that 'no airbag' suits pose thereto, consistently over time.").

B. The Decision Below Perpetuates Lower Courts' Misreading Of *Geier* And Warrants Plenary Review

At present there is not a square conflict among federal courts of appeals or state courts of last resort on the question whether FMVSS 208 preempts claims challenging a manufacturer's decision not to install a Type 2 seatbelt. The appellate courts that have addressed that question have adopted the same erroneous reading of *Geier* discussed above. In the government's view, however, this Court's review is warranted, for two reasons. First, the question presented is significant and recurring. The lower courts repeatedly have over-read a decision of this Court to hold that a federal regulation preempts state law, even though the federal agency that promulgated and administers that regulation disagrees. And the dispute between the courts and the federal department that promulgated FMVSS 208 concerns a nationally important issue: the standards of care that govern the design and manufacture of motor vehicles. Second, the lower courts are currently in conflict on how to apply the reasoning of *Geier* to claims of FMVSS preemption generally. This Court need not and should not postpone addressing this broad methodological issue until a square conflict develops over the preemptive effect of a particular provision of a particular FMVSS applicable to a particular class of vehicles.

1. The decision below follows decisions of two federal courts of appeals and several intermediate state courts in finding that the 1989 amendments to FMVSS 208 preempt state common-law tort actions concerning the installation of Type 1 seatbelts. See *Carden* v. *Gen-*

eral Motors Corp., 509 F.3d 227, 231 (5th Cir. 2007), cert. denied, 128 S. Ct. 2911 (2008); *Griffith* v. *General Motors Corp.*, 303 F.3d 1276, 1281-1282 (11th Cir. 2002), cert. denied, 538 U.S. 1023 (2003); *Roland* v. *General Motors Corp.*, 881 N.E.2d 722, 729 (Ind. Ct. App.), transfer denied, 898 N.E.2d 1218 (Ind. 2008) (Table); *Heinricher* v. *Volvo Car Corp.*, 809 N.E.2d 1094, 1098 (Mass. App. Ct.), review denied, 815 N.E.2d 1085 (Mass. 2004) (Table); see also *Hurley* v. *Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000) (Type 1 seatbelt installed in driver's seat of bus), cert. denied, 531 U.S. 1148 (2001). Those decisions interpreted the history of FMVSS 208 as showing that NHTSA "decided to leave manufacturers the option to select between lap-only and lap-shoulder belts" in rear inboard seating positions. *Carden*, 509 F.3d at 231; accord *Griffith*, 303 F.3d at 1282 (suit over Type 1 seatbelt preempted because it "would foreclose an option specifically permitted by FMVSS 208"); *Roland*, 881 N.E.2d at 729 ("The present case • • • involves a choice made available as part of the comprehensive regulatory action expressed in FMVSS 208."); *Heinricher*, 809 N.E.2d at 1098 ("[T]he preemptive effect of Standard 208 • • • encompasses the two alternative manual restraint systems at issue here. • • • Federal law plainly provided Volvo Car Corporation with the option of installing *either* a two-point lap belt *or* a three-point lap-shoulder harness in the rear center seat of its vehicles.").

As discussed above, however, NHTSA disagrees with those courts' characterization of its rulemaking. The government's briefs to this Court have consistently explained that NHTSA's decision to allow options, standing alone, does not compel a finding of preemption. See pp. 15-17, *supra*. Rather, in cases like this one, the

FMVSS contemplates several ways of meeting the federal minimum standard. But without more (such as the emphasis on diversity of solutions discussed in *Geier*), the States are not foreclosed from concluding, through a duty of care applied in common-law tort actions, that one option is superior to the others. Given the "technical" and "complex" nature of this regulatory framework, *Geier*, 529 U.S. at 883, there is a significant risk that the lower courts' mistaken understanding of the regulatory purpose will be self-perpetuating. See, *e.g.*, *Roland*, 881 N.E.2d at 727 (relying on *Carden*, *Heinricher*, and *Griffith*); *Carden*, 509 F.3d at 231 (relying on *Griffith*).

Moreover, the issue remains significant. NHTSA estimates that in 2008, approximately 1,040,438 vehicles in the United States were equipped with some Type 1 seatbelts, any one of which could potentially become the subject of a tort suit like this one. Thus, although all motor vehicles manufactured today with a gross vehicle weight rating of 10,000 pounds or less are required to have Type 2 seatbelts at seating positions like the one at issue in this case, see note 1, *supra*, the preemptive effect of FMVSS 208 on claims involving older vehicles remains sufficiently important to warrant this Court's review. Analogously, this Court granted review in *Geier* although by that time the question presented no longer affected new cars: NHTSA had already required passenger cars to include front-seat airbags, beginning with the 1998 model year. See 49 C.F.R. 571.208(S4.1.5.3).[3]

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[3] Although this case involves the use of a Type 1 seatbelt in an aisle seat rather than a true center seat, respondents do not contend in their brief in opposition that this fact makes any pertinent difference to the preemption analysis. See, *e.g.*, Br. in Opp. i, 22-23 (describing the issue in this case as pertaining to the "rear center seat").

2. The analytical question presented by this case—how to apply *Geier*'s reasoning to FMVSS provisions that do not affirmatively seek to foster a diversity of options—has already produced conflicts in the lower courts, even though not in the precise circumstances presented here. Thus, for instance, lower courts have reached conflicting conclusions on how to apply *Geier* to FMVSS 205, 49 C.F.R. 571.205, which allows manufacturers to use either tempered or laminated glass in vehicle side windows. Some courts have held that FMVSS 205 does not conflict with a state common-law duty of care requiring installation of laminated glass. See, *e.g.*, *O'Hara* v. *General Motors Corp.*, 508 F.3d 753, 762-763 (5th Cir. 2007);[*] *MCI Sales & Serv., Inc.* v. *Hinton*, 272 S.W.3d 17, 29 (Tex. Ct. App. 2008), review granted, No. 09-0048 (Tex. argued Mar. 24, 2010). Other courts have concluded that FMVSS 205 gives manufacturers the "option" to install either tempered or laminated glass, and that state common law may not penalize choosing either one. See, *e.g.*, *Morgan* v. *Ford Motor Co.*, 680 S.E.2d 77, 94-95 (W. Va. 2009); *Lake* v. *Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 WL 891867, at *6-*9 (Tenn. Ct. App. Mar. 15, 2010). Similarly, lower courts have reached conflicting conclusions on whether the absence in FMVSS 208 of any requirement of passenger seatbelts in buses preempts common-law requirements to install such seatbelts. Compare *MCI Sales & Serv.*, 272 S.W.3d at 23-28 (common-law claim not preempted), with *Lake*,

[*] The Fifth Circuit decided *O'Hara* only weeks before a different panel decided *Carden*, which concluded that FMVSS 208 did have preemptive effect on facts like those here. *Carden* did not cite *O'Hara*'s interpretation of *Geier* or its discussion of the preemptive effect of the availability of options unde a FMVSS.

2010 WL 891867, at *9-*11 (common-law claim impliedly preempted), and *Doomes* v. *Best Transit Corp.*, 890 N.Y.S.2d 526, 527 (App. Div. 2009) (same).

Even those courts that have read *Geier* to require preemption under such circumstances have noted the need for further guidance from this Court. See, *e.g.*, *Morgan*, 680 S.E.2d at 94 ("We discern that we are stuck between a rock and a jurisprudential hard place. * * * *Geier* is flawed because it requires courts to * * * divine an agency's interpretation from extraneous materials to determine the preemptive effect of a regulation. * * * [But] *Geier* is, until altered or explicated by [this] Court, the guiding law of the land."); accord *Lake*, 2010 WL 891867, at *7.

Review by this Court is therefore warranted even in the absence of a conflict among decisions of federal courts of appeals and state high courts concerning the preemptive effect of the particular feature of FMVSS 208 at issue here. The acknowledged confusion and, in the government's view, widespread error in the lower courts over the decade since *Geier* are of sufficient importance to warrant plenary review of the first question presented. Moreover, given the opposing views of the responsible agency and a number of lower courts, further percolation is not necessary for this Court to have the full benefit of the opposing perspectives on the preemptive effect of FMVSS 208.

C. This Court Lacks Jurisdiction To Review Petitioners' Failure-To-Warn Claim

This Court lacks jurisdiction to consider "a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the

judgment." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). The state appellate court held that petitioners waived their failure-to-warn claim. See Pet. App. 25. That holding was based on state procedural requirements, and petitioners have not offered any reason to conclude that those requirements are not both independent and adequate to support the dismissal.[5] Therefore, this Court lacks jurisdiction to review the second question presented.

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[5] Although the state court briefly addressed the merits of the preemption question in the alternative, see Pet. App. 26, that discussion does not detract from the adequacy of the state-law ground. *See, e.g.*, *Sochor* v. *Florida*, 504 U.S. 527, 533 (1992) (citing *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983)).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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No. 08-1314

In The
Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

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ORANGE COUNTY SUPERIOR COURT

CASE NUMBER: 04CC06494

Filing Date	Sequence	Docket Entry
07-JUN-2004	1	COMPLAINT WILLIAMSON, DELBERT
07-JUL-2004	2	APPLICATION & ORDER FOR APPOINTMENT OF GUARDIAN AD WILLIAMSON, DELBERT
07-JUL-2004	3	NOTICE OF UNDOCUMENTED ACTION – OTHER
		SUMS ISSUED
02-AUG-2004	4	PROOF OF SERVICE – SUBSTITUTED WILLIAMSON, DELBERT
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ONE MILL ROAD		
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09-DEC-2004	18	SEE OTHER MINUTE ORDER THIS DATE
10-DEC-2004	19	MINUTE ORDER

05-JAN-2005	23	ANSWER/GENERAL DENIAL TO AMENDED COMPLAINT MAZDA MOTOR OF AMERICA INC
05-JAN-2005	24	ANSWER/GENERAL DENIAL TO AMENDED COMPLAINT FORD MOTOR COMPANY
24-JAN-2005	25	ANSWER/GENERAL DENIAL TO AMENDED COMPLAINT AUTOMATIC EQUIPMENT MANUFACTURING

FIRST

08-APR-2005	26	MOTION – OTHER WILLIAMSON, DELBERT

FOR LEAVE TO FILE 2ND AMENDED CPLT
5-5-05 2:30 C31

27-APR-2005	29	OPPOSITION/OBJECTION MAZDA MOTOR OF AMERICA INC
28-APR-2005	28	REPLY/RESPONSE WILLIAMSON, DELBERT
05-MAY-2005	27	MIN ORDER – MOTION GRANTED

09-MAY-2005	30	NOTICE OF RULING WILLIAMSON, DELBERT
26-MAY-2005	32	ANSWER/GENERAL DENIAL TO AMENDED COMPLAINT AUTOMATIC EQUIPMENT MANUFACTURING
03-JUN-2005	33	REQUEST FOR DISMISSAL – PARTIAL W/PREJUDICE WILLIAMSON, DELBERT
		DISMISSED AS TO FORD MOTOR COMPANY ONLY
27-JUN-2005	34	NOTICE OF UNDOCUMENTED ACTION
		SUMS ISSUED ON 2ND AMENDED CPLT
26-JUL-2005	35	NOTICE OF CASE MANAGEMENT HEARING
26-JUL-2005	36	NOTICE MAILED
25-AUG-2005	37	MINUTE ORDER – MATTER CONTINUED
07-SEP-2005	40	CASE MANAGEMENT STATEMENT WILLIAMSON, DELBERT
16-SEP-2005	39	CASE MANAGEMENT STATEMENT MAZDA MOTOR OF AMERICA INC

16-SEP-2005	41	CASE MANAGEMENT STATEMENT AUTOMATIC EQUIPMENT MANUFACTURING
22-SEP-2005	38	MINUTE ORDER – MATTER CONTINUED
23-SEP-2005	42	NOTICE BY COUNSEL OF CASE MANAGEMENT CONFERENCE WILLIAMSON, DELBERT
CONTINUANCE		
07-OCT-2005	43	ANSWER/GENERAL DENIAL TO AMENDED COMPLAINT MAZDA MOTOR CORPORATION
SECOND		
19-OCT-2005	45	CASE MANAGEMENT STATEMENT MAZDA MOTOR OF AMERICA INC
24-OCT-2005	44	MINUTE ORDER – HEARING COMPLETED
30-NOV-2005	46	MASS NOTICE OF REASSIGNMENT
01-DEC-2005	47	NOTICE MAILED

06-DEC-2005	48	MOTION TO DISMISS MAZDA MOTOR CORPORATION

1/5/06 1:30 C20

06-DEC-2005	49	SPECIAL FILING SEE REMARKS MAZDA MOTOR CORPORATION

COMPENDIUM OF OUT OF STATE AUTHORITIES

13-DEC-2005	50	JOINDER AUTOMATIC EQUIPMENT MANUFACTURING

TO DEFT MAZDA MOTOR CORP'S MOTION TO DISMISS 1/5/06 1:30 C20

16-DEC-2005	51	JOINDER MAZDA MOTOR OF AMERICA INC

JOINS DEFT MAZDA MOTOR CORP'S MOTION TO DISMISS 1/5/06 1:30 C20

21-DEC-2005	63	OPPOSITION/OBJECTION WILLIAMSON, DELBERT
28-DEC-2005	52	REPLY/RESPONSE MAZDA MOTOR OF AMERICA INC

TO OPPOSITION TO MOTION TO DISMISS ON GROUNDS OF FORUM NON CONVENIENS

30-DEC-2005	54	DECLARATION WILLIAMSON, DELBERT

SHAHRAM A SHAYESTEH

30-DEC-2005	55	MEMORANDUM OR POINTS & AUTHORITIES WILLIAMSON, DELBERT
30-DEC-2005	56	MEMORANDUM OR POINTS & AUTHORITIES WILLIAMSON, DELBERT
01-JAN-2006	53	VACATED MATTER
05-JAN-2006	57	MIN ORDER – TAKEN UNDER SUBMISSION

JOINDER TO MOTION TO DISMISS FILED BY DEFT MAZDA MOTOR OF AMERICA, INC. DBA MAZDA NORTH AMERICAN OPERATIONS AND JOINDER

05-JAN-2006	58	SEE OTHER MINUTE ORDER THIS DATE
05-JAN-2006	59	SEE OTHER MINUTE ORDER THIS DATE
08-FEB-2006	62	NOTICE – OTHER MAZDA MOTOR CORPORATION

AMENDED NOTICE OF MOTION TO DISMISS FOR FORUM NON CONVENIENS

21-FEB-2006 60 MINUTE ORDER

ERROR – MN101 DOCKET ENTRY DATED 21-FEB-2006, SEQ# 60, LISTED IN ERROR, DUPLICATED ENTRY

21-FEB-2006 61 MINUTE ORDER

NO APPEARANCES. COURT HAVING TAKEN DEFENDANT MAZDA MOTOR CORPORATION'S MOTION TO DISMISS FOR FORUM NON CONVENIENS UNDER

21-FEB-2006 123 ENTERED IN ERROR

ERROR – MN101 DOCKET ENTRY DATED 21-FEB-2006, SEQ# 60, LISTED IN ERROR, DUPLICATED ENTRY

22 MAR 2006 64 APPEAL – OTHER DOCUMENT

ORDER RE: PETITION FOR WRIT OF MANDATE. G036820.

17-MAY-2006 65 NOTICE OF UNDOCUMENTED ACTION

24 COMMISSIONS ISSUED

05-JUN-2006 66 NOTICE OF UNDOCUMENTED ACTION

5 COMMISSIONS ISSUED

05-JUN-2006	67	APPLICATION – OTHER MAZDA MOTOR CORPORATION

FOR ISSUANCE OF COMMISSIONS TO TAKE OUT OF STATE DEPO (PROPOSED) ETC

13-JUN-2006	68	MOTION FOR JUDGMENT ON THE PLEADINGS MAZDA MOTOR CORPORATION

7/9/06 1:30 C20

13-JUN-2006	69	REQUEST FOR JUDICIAL NOTICE MAZDA MOTOR CORPORATION
13-JUN-2006	70	SPECIAL FILING SEE REMARKS MAZDA MOTOR CORPORATION

APPENDIX OF OUT OF STATE AUTHORITIES IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

21-JUN-2006	71	SUBSTITUTION OF ATTORNEY MAZDA MOTOR CORPORATION

SUBS IN BOWMAN BROOKE

22-JUN-2006	81	REQUEST FOR JUDICIAL NOTICE WILLIAMSON, DELBERT
22-JUN-2006	83	OPPOSITION/OBJECTION WILLIAMSON, DELBERT
28-JUN-2006	80	SPECIAL FILING SEE REMARKS MAZDA MOTOR OF AMERICA INC

CONFIDENTIALITY AGREEMENT & STIPULATED PROTECTIVE ORDER

28-JUN-2006	82	REQUEST FOR JUDICIAL NOTICE MAZDA MOTOR CORPORATION
28-JUN-2006	88	DECLARATION MAZDA MOTOR CORPORATION

JULIAN G SENIOR

29-JUN-2006	78	APPLICATION – OTHER MAZDA MOTOR CORPORATION

FOR ISSUANCE OF COMM TO TAKE OUT OF STATE DEPO (PROPOSED) ETC

29-JUN-2006	79	NOTICE OF UNDOCUMENTED ACTION

ONE COMMISSION ISSUED

05-JUL-2006 72 MINUTE ORDER

PLAINTIFFS' UNOPPOSED EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME IS GRANTED. MOTION TO CONTINUE TRIAL HEARD AND

05-JUL-2006 73 VACATED MATTER

TRIAL SET ON 08-07-06 @ 9 AM IS CONTINUED TO 11-06-06 @ 9 AM IN DEPT. C20 PER 07-05-06 M.O.

05-JUL-2006 75 EX PARTE MOTION/APPLICATION

WILLIAMSON, DELBERT

05-JUL-2006 76 ORDER – OTHER

GRANTING PLTFS APPLICATION FOR ORDER SHORTENING TIME

05-JUL-2006 77 REPLY/RESPONSE

MAZDA MOTOR OF AMERICA INC

05-JUL-2006 84 SPECIAL FILING SEE REMARKS

MAZDA MOTOR OF AMERICA INC

QUALIFIED NON-OPPOSITION TO EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME WITHIN WHICH TO HEAR PLAINTIFFS' NOTICE OF

06-JUL-2006 74 MIN ORDER – MOTION GRANTED

ARGUMENT HEARD. MOTION FOR JUDGMENT ON THE PLEADINGS FILED BY DEFENDANT MAZDA MOTOR CORPORATION IS GRANTED. COURT WILL A

11-JUL-2006 93 OPPOSITION/OBJECTION
WILLIAMSON, DELBERT

13-JUL-2006 85 JURY FEES POSTED
MAZDA MOTOR OF AMERICA INC

JURY FEES DEPOSITED $150.00 TD 11/06/06 CHECK# 165722 RECEIPT # 01060002776D

13-JUL-2006 86 NOTICE OF UNDOCUMENTED ACTION/JURY FEES POSTED

13-JUL-2006 87 NOTICE – OTHER
MAZDA MOTOR OF AMERICA INC

POSTING JURY FEES

18-JUL-2006 89 AMENDED COMPLAINT
WILLIAMSON, DELBERT

THIRD

18-JUL-2006 92 OPPOSITION/OBJECTION
WILLIAMSON, DELBERT

20-JUL-2006	90	MOTION ATTY TO APPEAR PRO HAC VICE MAZDA MOTOR OF AMERICA INC

09/07/06 1:30PM C20

26-JUL-2006	91	NOTICE OF CHANGE OF ADDRESS AUTOMATIC EQUIPMENT MANUFACTURING
31-JUL-2006	101	NOTICE OF CONTINUANCE MAZDA MOTOR OF AMERICA INC
11-AUG-2006	94	NOTICE OF RULING MAZDA MOTOR CORPORATION
11-AUG-2006	95	ORDER – OTHER MAZDA MOTOR CORPORATION

GRANTING MAZDA MOTOR CORP'S MTN FOR JUDGMENT ETC

22-AUG-2006	96	DEMURRER TO AMENDED COMPLAINT MAZDA MOTOR CORPORATION

SEPT 26, 2006 1:30PM C20

22-AUG-2006	97	SPECIAL FILING SEE REMARKS MAZDA MOTOR CORPORATION

APPENDIX OF OUT OF STATE AUTHORITIES

22-AUG-2006	98	MOTION TO STRIKE MAZDA MOTOR OF AMERICA INC

SEPT 26, 2006 1:30PM C20

29-AUG-2006	103	DECLARATION AUTOMATIC EQUIPMENT MANUFACTURING

OF DARIN W. FLAGG IN SUPPORT OF GOOD FAITH APPLICATION

29-AUG-2006	104	NOTICE OF SETTLEMENT AUTOMATIC EQUIPMENT MANUFACTURING
29-AUG-2006	106	APPLICATION FOR DETERMINATION OF GOOD FAITH SETTLE AUTOMATIC EQUIPMENT MANUFACTURING
29-AUG-2006	113	MOTION/HEARING – OTHER MAZDA MOTOR CORPORATION

AMENDED

07-SEP-2006 99 MIN ORDER – MOTION GRANTED

MOVING PARTY STIPULATES TO PRO TEM JEREMY MARCH TO HEAR THIS MATTER. STIPULATION FOR TEMPORARY JUDGMENT
SIGNED AND FILED

07-SEP-2006 100 ORDER – OTHER

RE: DAVID R KELLY'S APPL AND DECL FOR PRO HAC VICE ADMISSION

07-SEP-2006 102 STIPULATION FOR TEMPORARY JUDGE

12-SEP-2006 115 SPECIAL FILING SEE REMARKS
AUTOMATIC EQUIPMENT MANUFACTURING

AMENDED APPLICATION FOR GOOD FAITH DETERMINATION

12-SEP-2006 116 NOTICE OF SETTLEMENT
AUTOMATIC EQUIPMENT MANUFACTURING

AMENDED

12-SEP-2006 117 DECLARATION
AUTOMATIC EQUIPMENT MANUFACTURING

AMENDED

13-SEP-2006	109	REQUEST FOR JUDICIAL NOTICE WILLIAMSON, DELBERT
15-SEP-2006	105	NOTICE – OTHER MAZDA MOTOR OF AMERICA INC

OF ENTRY OF ORDER

18-SEP-2006	111	OPPOSITION/OBJECTION WILLIAMSON, DELBERT
19-SEP-2006	110	REPLY/RESPONSE MAZDA MOTOR CORPORATION
26-SEP-2006	107	MIN ORD – DEMURRER SUSTAINED
26-SEP-2006	108	SEE OTHER MINUTE ORDER THIS DATE

DEFENDANT'S DEMURRER TO 3RD AMENDED COMPLAINT IS SUSTAINED WITHOUT LEAVE TO AMEND.

26 SEP-2006	112	REQUEST FOR JUDICIAL NOTICE WILLIAMSON, DELBERT
06-OCT-2006	118	CORRESPONDENCE
18-OCT-2006	114	ORDER – OTHER AUTOMATIC EQUIPMENT MANUFACTURING

25-OCT-2006	120	ORDER – OTHER MAZDA MOTOR CORPORATION

SUSTAINING DEMURRER TO PLFTS' THIRD AMENDED CPL

26-OCT-2006	122	SPECIAL FILING SEE REMARKS MAZDA MOTOR CORPORATION

SUMMARY OF RESPONSE (PROPOSED) ORDER

06-NOV-2006	119	MIN ORD HEARING OFF CALENDAR

NO APPEARANCES. TRIAL TAKEN OFF CALENDAR. DEMURRER TO THE THIRD AMENDED COMPLAINT SUSTAINED WITHOUT LEAVE TO AMEND ON 09

16-NOV-2006	124	REQUEST – OTHER MAZDA MOTOR CORPORATION

FOR CLARIFICATION CORRECTION OR MOD OF THE JDGMT

07-FEB-2007	125	ORDER – OTHER MAZDA MOTOR CORPORATION

AMENDED

23-FEB-2007	126	NOTICE – OTHER MAZDA MOTOR CORPORATION

OF ENTRY OF AMENDED ORDER SUSTAINING DEMURRER ETC

27-APR-2007	127	REQUEST FOR DISMISSAL – PARTIAL W/PREJUDICE WILLIAMSON, DELBERT
18-JUN-2007	128	STIPULATION AND ORDER WILLIAMSON, DELBERT

California Court of Appeal
4th Appellate District Division 3
Case Number G038845

Date	Description	Notes
06/22/2007	Notice of appeal lodged/received.	Appellants' Delbert Williamson, et al.
06/29/2007	Civil case information statement filed.	
07/11/2007	Notice to reporter to prepare transcript.	CSR: K. Rex

08/08/2007	Reporter's transcript filed.	R-1
08/08/2007	Notice per rule 8.124 – with reporter's transcript.	Filed in superior court 6/21/07.
09/05/2007	Requested – extension of time	
09/06/2007	Stipulation of extension of time filed to:	Stipulation granted for all briefs. AAO due 11/6/07, RB due 90 days thereafter and ARB due 80 days.
10/22/2007	Appellant's appendix and opening brief filed.	Plaintiff and Appellant: Williamson, Delbert Attorney: David J. Bennion Attorney: David Lira Plaintiff and Appellant: Williamson, Alexa * * * SEE STIPULATION OF 9/6/07 FOR NEXT BRIEF SCHEDULE * * * (2) vols. appendix.

01/18/2008	Requested – extension of time	
01/18/2008	Granted – extension of time.	
03/06/2008	Respondent notified pursuant to rule 8.220(a)(2).	
03/18/2008	Requested – extension of time	
03/18/2008	Granted – extension of time.	2nd ext – rb ext'd to 4/1/08
04/03/2008	Respondent's brief	Defendant and Respondent: Mazda Motor Corporation Attorney: Brian Takahashi Defendant and Respondent: Mazda Motor of America, Inc. Attorney: Brian Takahashi Constructively filed 4/1/08 – Overnite Express
04/03/2008	Argument letter sent.	

04/03/2008	Request for judicial notice filed.	by respondents w/1 vol exhibits submitted separately (exhibits received only)
04/10/2008	Request for oral argument filed by:	atty. David Lira counsel for aplt. Time estimate 30 minutes.
04/14/2008	Request for oral argument filed by:	Atty Robert s. Robinson counsel for resp. Time estimate – 20 mins.
04/15/2008	Appellant's reply brief.	Plaintiff and Appellant: Williamson, Delbert Attorney: David Lira Plaintiff and Appellant: Williamson, Alexa Attorney: David Lira
04/15/2008	Case fully briefed.	
04/29/2008	Application to file amicus curiae brief filed by:	Product Liability Advisory Council, Inc. by law firm of Snell & Wilmer in support of the respondent/Mazda Motor Corp.
04/29/2008	Application to file amicus curiae brief filed by:	The Alliance of Automobile Manufacturers, Inc. in support of respondents

		Mazda Motor Corporation, et al.
04/29/2008	Application filed to:	by atty Adam C. Sloane to appear as pro hac vice for a/c Alliance of Automobile Manufacturers, Inc.
04/29/2008	Application filed to:	application by atty Erika Z. Jones to appear as pro hac vice for a/c Alliance of Automobile Manufacturers, Inc.
05/16/2008	Order granting motion to file amicus curiae brief.	The applications of Product Liability Advisory Council, Inc., and The Alliance of Automobile Manufacturers, Inc., for leave to file amicus curiae briefs in support of respondents are GRANTED. (Cal. Rules of Court, rule 8.200(c)(1).) The clerk of this court is directed to file forthwith the amicus curiae briefs submitted with the applications. Any party may file an answer to the amicus

curiae briefs no later than June 3, 2008. (Cal. Rules of Court, rule 8.200(c)(5).) The applications of Adam C. Sloane and Erika Z. Jones to appear as counsel pro hac vice for amicus curiae The Alliance of Automobile Manufacturers, Inc., are GRANTED. (Cal. Rules of Court, rule 9.40.) Donald M. Falk is the associated attorney of record. (Cal. Rules of Court, rule 9.40(a).) Counsel for amici curiae are reminded that whether amici curiae may participate in oral argument is at the discretion of the panel hearing the matter (Cal. Rules of Court, rule 8.256(c)(2)), and that the number of counsel who may argue for any person is subject to the limitations contained in California Rules of Court, rule 8.256(c)(3).

		Any request by amici curiae to argue must be made by separate written application no later than 20 days before the date set for oral argument. This matter is set for the August 2008 oral argument calendar. Notice of the date and time will be given by the clerk of this court.
05/16/2008	Amicus curiae brief filed by:	Amicus curiae for respondent: Product Liability Advisory Council, Inc. Attorney: Todd Eric Lundell
05/16/2008	Amicus curiae brief filed by:	Amicus curiae for respondent: Alliance of Automobile Manufacturers, Inc. Attorney: Donald M. Falk
05/23/2008	Response to amicus curiae brief filed by:	by aplts.
05/23/2008	To court.	respondent's request for judicial notice w/1 vol exhibits submitted

		separately (exhibits received only)
06/05/2008	Case briefed and on assignment panel.	for August 2008 Calendar
07/09/2008	Order filed.	Respondents' request for judicial notice will be decided in conjunction with the decision on appeal.
07/10/2008	Calendar notice sent. Calendar date:	8/26/08 at 9:00 a.m.
08/18/2008	pro hac vice application	Application of David R. Kelly to appear on behalf of respondents Mazda Motor Corporation and Mazda Motor of America, Inc.
08/19/2008	To court.	Application of David R. Kelly to appear on behalf of respondents Mazda Motor Corporation and Mazda Motor of America, Inc.
08/20/2008	pro hoc vice granted	The application of David R. Kelly to appear as counsel pro hac vice for

		defendants and respondents Mazda Motor of America, Inc. and Mazda Motor Corporation is GRANTED. (Cal. Rules of Court, rule 9.40.) Brian Takahashi and/or Robert S. Robinson are the associated attorneys of record. (Cal. Rules of court, rule 9.40(a).)
08/22/2008	Mail returned and re-sent.	copy of order dated 08/20/08 to atty. David Kelly
08/26/2008	Cause argued and submitted.	Atty Howard B. Miller argued for aplts. Atty David R. Kelly argued for resps. Atty Brian Takahashi was present on behalf of resps.
10/22/2008	Opinion filed.	Judgment affirmed (Signed Published) Request for judicial notice granted. (Rylaarsdam) Sills Ikola
11/03/2008	Rehearing petition filed.	by aplts.

11/12/2008	Answer to rehearing petition filed.	By respondents
11/18/2008	Mod. of opinion filed (no change in judgment).	The petition for rehearing is denied. Rylaarsdam/Sills/Ikola
12/03/2008	Service copy of petition for review received.	by appellant
12/10/2008	Record transmitted to Supreme Court.	1-misc, 1-aob, 1-rb, 1-arb, 1-petition for rehearing, 1-answer for rehearing, 1-petition for Review, 1-answer to amicus curaie, 1- application for product liability.
01/26/2009	Ext. by Supreme Court re: petition for hearing filed:	to 02/27/09
02/18/2009	Petition for review denied in Supreme Court.	Filed 2/11/09 The petition for review is denied.
02/19/2009	Remittitur issued.	
02/19/2009	Case complete.	
02/26/2009	Record returned from Supreme Court.	1 misc. folder, 1 aob, 1rb, 1arb, 1 petition for hearing, 1answer

		to petition for hearing, 1 amicus brief
04/28/2009	Received copy of:	Supreme Court letter dated 04/24/09 re the petition for a writ of certiorari in the above entitled case was filed on 04/22/09 and placed on the docket 04/24/09 as No. 08-1314.
12/01/2009	Record shipped to records center	list # 84 loc# 622212581
06/01/2010	Received copy of:	US Supreme Court notice dated 5/24/10: The Court today entered the following order in the above-entitled case: The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. (No. 08-1314).

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Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF
ORANGE COUNTY

DELBERT WILLIAMSON, ALEXA WILLIAMSON, THROUGH HER GUARDIAN AD LITEM, DELBERT WILLIAMSON AND THE ESTATE OF	No. 04CC06494 **COMPLAINT FOR PERSONAL INJURY AND PRODUCT LIABILITY AND FOR WRONGFUL**

THANH WILLIAMSON, AND DOES 1-10, inclusive,

Plaintiffs,

v.

MAZDA MOTOR OF AMERICA INC., FORD MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, AND DOES 1-10, inclusive,

Defendants.

DEATH AND FOR EXEMPLARY DAMAGES

(Filed Jun. 7, 2004)

JUDGE ROBERT H. GALLNAN DEPT. C28

Plaintiffs, and each of them, for their claims against Defendants, Ford Motor Company, Mazda Motor of America Inc., Automatic Equipment Manufacturing Company, and Does 1-10, jointly and separately allege as follows:

GENERAL ALLEGATIONS

1) Delbert Williamson and Alexa Williamson were at all times relevant are and were residents of the State of Utah.

2) Mazda Motor of America Inc., hereinafter referred to as "MAZDA," has its principal place of business in Irvine, California.

3) Ford Motor Company, herein after referred to as "FORD" is a company that was organized and incorporated under the laws of Delaware and

has its principal place of business in Detroit, Michigan.

4) Automatic Equipment Manufacturing Company, herein after referred to as "AUTOMATIC" is a company that was organized under the laws of Nebraska and has its principal place of business in Nebraska. "BLUE OX" is a division of AUTOMATIC.

5) Does 1-10 are business entities and/or individuals who are legally responsible – and whose identities are at present unknown – for the injuries and death described herein.

6) On information and belief, FORD and MAZDA, shared design development certification manufacturing and distribution responsibility for the Mazda vehicle which was being driven by Delbert Williamson at the time of the accident herein.

7) On or about August 14, 2002, in Kane County, Township of Orderville, in the State of Utah, Jack W. Bonzelaar, hereinafter referred to as "BONZELAAR," an employee of Sandcastle Properties, was traveling south on State Route 89, in the vicinity of the intersection of 290 North Center Street. Mr. Bonzelaar was towing a 1998 Jeep Wrangler, which became detached from the motor home being driven by him. The Jeep went across the center line and struck the 1993 Mazda MPV Minivan driven by Delbert Williamson.

8) Inside the 1993 Mazda MPV Minivan being driven by Delbert Williamson, Alexa Williamson

was in the middle row of seats behind the driver. Thanh Williamson was riding in the middle row center seat. Each of the Williamsons was wearing a fastened seat belt that was original equipment. Delbert Williamson and Alexa Williamson were wearing three point seat belts which were furnished with the Mazda vehicle. Thanh Williamson was wearing a lapbelt only, which was also furnished by the manufacturer.

9) The Mazda vehicle described above was defective and not crash worthy, in at least the following respects:

a) The front bumper of the vehicle contained no energy-absorbing foam or similar substance, nor was it an effective bumper in that it failed to absorb reasonable amounts of energy;

b) There was no horizontal bar in the driver's door, which permitted the door to buckle and the door latch to fail;

c) Certain welds in the vehicle were defective;

d) As a result of the aforementioned, and other defects in manufacture and design, and the lack of crush space, the driver's compartment was compromised, causing severe injury to Delbert Williamson;

e) Due to the lack of energy absorption materials in the defectively designed and manufactured vehicle, and due to a defective seat and seat-belt performance, Alexa Williamson sustained more rapid

deceleration and greater force to her body then she would have suffered otherwise, thereby causing severe and permanent injuries; and

f) The design calling for the installation of only a lap belt in the particular unique situation involving:

(1) Defective seat back;

(2) Defective welds;

(3) Lack of energy absorption-crush material in the front end of the vehicle; and

(4) improper anchoring of seat belt with improper angle.

g) The defective performance of the seat and of the lap-belt only restraint system, and including a defective seat back that broke – all these defects and others listed above, constituted a defect in design and manufacture, and together caused Thanh Williamson to go forward into the belt and caused her to suffer crushing to her mid section, severing major arteries which defects in design and manufacture were a substantial cause of her bleeding to death.

10) A Blue Ox tow bar, made by Blue Ox division of AUTOMATIC utilized by Bonzelaar, was defective in manufacture, in design and in lack of warning. Jack-knifing, which occurred previous to the accident, was a common and foreseeable occurrence, which resulted in foreseeable failures of components of the draw bar

assembly. Defects in design, manufacture and assembly of the trailer draw-bar assembly contributed as a substantial cause of the accident in that these defects contributed as a substantial cause of the jeep breaking loose from the trailer hitch.

11) Defendants failed to warn, as follows:

a) MAZDA and FORD failed to warn of the dangers foreseeable to FORD and MAZDA to driver and passengers in the uncrash-worthy Mazda;

b) AUTOMATIC failed to warn of the danger, which was foreseeable to AUTOMATIC, associated with driving this particular trailer bar after it had jack-knifed and failed to enumerate the foreseeable consequences of jack-knifing.

12) If the subject Mazda vehicle had been designed by FORD and MAZDA to be crashworthy and did not have the defects set forth above, the injuries to each of the plaintiffs would have been substantially less and Thanh Williamson would have survived the collision. It was a defect in design for MAZDA and FORD to place only a seatbelt with the performance characteristics it had in the manner in which it was installed at the seat of Thanh Williamson, particularly with a weak seat back and poor support under the seat bottom (an additional defect under the combination of circumstances) and lack of energy-absorbing materials in the vehicle. The angle between the belt anchor and the passenger's lap was also defective in design, in

that the lap belt did not cross the passenger's lap at a proper angle, but was likely in the configuration of the seat to override the pelvis of the passenger with this particular seat and seat back.

13) The Mazda vehicle, as a whole, was defective in its lack of crash worthiness, in that a person in the seating position that Thanh Williamson utilized, would be exposed to unusual forces and more rapid deceleration than is reasonable, exposing her to severe and fatal injury when only a lap belt was provided and improperly installed and in combination with a defective seat and seat back and seat belt geometry and poor performance, and with the other defects enumerated above.

14) MAZDA and FORD knew of these defects and that a substantial number of people would lose their lives or be severely injured because of the aforesaid defects. Nevertheless, and in conscious disregard of the safety of others, these Defendants acted egregiously and with malice, deliberately exposing passengers to severe injury or death in order to maximize profits at the expense of safety.

15) As a result of the defects and failures to warn alleged above, Delbert Williamson, Alexa Williamson, and the Estate of Thanh Williamson have incurred medical expenses in an amount within the jurisdiction of the Court, which will be supplied according to proof.

16) As a result of the defects and failure to warn alleged above, Delbert Williamson has suffered

loss of wages, which will be supplied according to proof.

17) As a result of the defects and failures to warn alleged above, Delbert Williamson incurred funeral and burial expenses for Thanh Williamson's Estate in an amount within the jurisdiction of the Court, which will be supplied according to proof.

18) As a result of the death of Thanh Williamson, which followed several hours of pain and suffering, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered a loss of love, affection, support, counsel, comfort, and society, to their general damages in an amount within the jurisdiction of this Court.

19) The aforementioned defects in design and manufacture and failures to warn were a substantial contributory cause of severe injury to Delbert Williamson and, Alexa Williamson, and to Thanh Williamson, which resulted in pain, impairment of normal bodily functions, and in the case of Thanh Williamson, her eventual death, to the general damage of Delbert and Alexa Williamson and in general and special damages to the estate of Thanh Williamson.

WHEREFORE, Plaintiffs individually pray as follows:

(1) For compensatory damages to each according to proof,

(2) For special damages to each according to proof,

(3) For exemplary damages to deter such conduct and make an example of Defendants;

(4) For cost of suit; and

(5) For such other relief as the Court determines to be just in the circumstances.

Dated: June 1, 2004

LAW OFFICES OF
DAVID J. BENNION

By: /s/ David J. Bennion
DAVID J. BENNION
Attorney for Plaintiff

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**SUPERIOR COURT OF
THE STATE OF CALIFORNIA
COUNTY OF ORANGE**

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD	**CASE NO. 04CC06494** Hon. Robert H. Gallivan (Dept. C28) **FIRST AMENDED COMPLAINT** 1. Strict Liability 2. Negligence 3. Intentional Misrepresentation and Concealment 4. Wrongful Death

MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, and DOES 1-100, inclusive, Defendants.	**DEMAND FOR JURY** (Filed Sep. 30, 2004)

Plaintiffs DELBERT WILLIAMSON, ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson, and ESTATE OF THANH WILLIAMSON hereby allege as follows:

SUMMARY

1. On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driven by Jack W. Bonzelaar.

2. All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts. Thanh Williamson, however, was killed when the forces generated by this collision caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding. Her husband and daughter, Delbert and Alexa Williamson, were also severely injured in the accident due to the defective

and uncrashworthy design of the 1993 Mazda MPV Minivan.

PARTIES

3. Plaintiff Delbert Williamson is an individual who resides in the State of Utah and is the deceased Thanh Williamson's husband.

4. Plaintiff Alexa Williamson is who resides in the State of Utah and is Delbert Williamson and the deceased Thanh Williamson's daughter.

5. Plaintiff Estate of Thanh Williamson is the probate estate of the deceased Thanh Williamson and is represented by her Survivors, Delbert Williamson and Alexa Williamson.

6. Defendant MAZDA MOTOR OF AMERICA, INC. ("MAZDA") is a California corporation, with its principal place of business in Irvine, California.

7. Defendant FORD MOTOR COMPANY ("FORD") is a Delaware corporation, with its principal place of business in Dearborn, Michigan. Based on information and belief, from January 1, 1979, to the present, FORD has a substantial and/or controlling ownership interest in MAZDA and many of MAZDA's automobiles are based in whole or in part on FORD's designs and technology.

8. Defendant AUTOMATIC EQUIPMENT MANUFACTURING COMPANY ("AEM") is a Nebraska

corporation, with its principle place of business in Pender, Nebraska.

9. The true names and/or capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 100, inclusive, are unknown to PLAINTIFFS, who therefore sue said DEFENDANTS by such fictitious names. PLAINTIFFS are informed and believe, and upon such information and belief allege, that each of the DEFENDANTS fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to, and proximately caused the injuries and damage to PLAINTIFFS hereinafter alleged. PLAINTIFFS will seek leave of Court to Amend this Complaint to assert the true names and/or capacities of such fictitiously named DEFENDANTS when the same have been ascertained.

10. PLAINTIFFS are informed and believe, and thereupon allege, that at all times mentioned herein, DEFENDANTS, including DOES 1 through 100, were the agents, servants, employees and/or joint venturers of their co-DEFENDANTS, and were, as such, acting within the course, scope and authority of said agency, employment and/or joint venture, and that each and every DEFENDANT, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every DEFENDANT as an agent, employee and/or joint venturer.

11. MAZDA, FORD, and DOES 1 through 100, are at all time herein mentioned were engaged in the business of selling, manufacturing, designing, testing, engineering, marketing, modifying, assembling, inspecting, distributing, and controlling Mazda MPV Minivans and other similar automobiles. MAZDA, FORD, and DOES 1 through 100, market, distribute, sell, modify and repair their vehicles, including the 1993 Mazda MPV Minivan, within the County of Orange, State of California.

12. MAZDA, FORD, and DOES 1 through 100, knew, expected and intended the 1993 Mazda MPV Minivans and other similar automobiles and/or substantially similar automobiles to be used for the purposes of transporting persons and property.

13. MAZDA, FORD, and DOES 1 through 100, at all times herein mentioned knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles and/or substantially similar automobiles and their component parts would be purchased and used by the purchaser or user without inspection for defects or dangerous propensities or properties therein or in any of its component parts.

14. MAZDA, FORD, and DOES 1 through 100, knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles, including its component parts, were highly dangerous and equipped with hazardous instrumentalities to persons riding in them and/or close proximity to them should such automobile, particularly its restraint

systems, or any associated parts or components and/or the design, materials, workmanship, configuration, or location thereof be in any manner defective or fail use.

GENERAL ALLEGATIONS

15. On August 14, 2002, Delbert Williamson, Thanh Williamson, and their daughter, Alexa Williamson, were traveling in their 1993 Mazda MPV Minivan, heading north on Route 89 in Kane County, Utah. Delbert was driving the Minivan, Thanh was sitting in the middle seat of the middle row of seats, and Alexa was sitting just behind Delbert in the middle row, next to her mother. Delbert, Thanh, and Alexa were all wearing their seatbelts, but whereas Delbert and Alex were wearing three-point seatbelts, Thanh was wearing a two-point seatbelt or lap belt.

16. Meanwhile, Jack W. Bonzelaar was driving a motor home, heading south on Route 89, towing a 1998 Jeep Wrangler using a "Blue Ox" tow bar. Suddenly, the Jeep Wrangler became detached from Bonzelaar's motor home and crossed the center divider line of Route 89, striking the 1993 Mazda MPV Minivan being driven by Delbert Williamson.

17. As a proximate result of this collision, Thanh Williamson suffered fatal abdominal injuries and internal bleeding, Delbert Williamson suffered fractures to the right wrist, ankle and foot, and Alexa Williamson suffered abdominal contusions and mesenteric hematoma, requiring surgical intervention.

These injuries would not have occurred or they would not have been as severe had FORD, MAZDA, and DOES 1 through 100 designed the subject 1993 Mazda MPV ("SUBJECT VEHICLE") and its components to be safer and more crashworthy.

18. FORD, MAZDA, and DOES 1 through 100, designed tested, engineered, manufactured, assembled, distributed, marketed and sold the SUBJECT VEHICLE.

19. At the time of its manufacture and retail sale by FORD, MAZDA, and DOES 1 through 100, the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe for its intended purposes and uses in that, among other respects:

a. It was equipped with inferior and unsafe two-point lap belts in the middle seating positions, when it should reasonably have been equipped with three point seat belts, as the remaining seats in the SUBJECT VEHICLE;

b. It was not equipped with a front bumper that did not [sic] contain sufficient energy-absorbing foam or similar substance, sufficient to absorb reasonable amounts of force from a collision;

c. It was not equipped with a horizontal bar in the driver's door, to protect against buckling and to permit the door latch to remain operational; and

d. Its front seating area lacked sufficient crush space, such that in a frontal collision, the driver and front passenger's seats are compromised.

20. FORD, MAZDA, and DOES 1 through 100, breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE, as follows:

a. FORD, MAZDA, and DOES 1 through 100 had knowledge, prior to the sale of the SUBJECT VEHICLE to PLAINTIFFS, of the dangers of two-point lap belts and failed to warn PLAINTIFFS and other consumers of such dangers;

b. FORD, MAZDA, and DOES 1 through 100 failed to adequately evaluate the performance and crashworthiness of the SUBJECT VEHICLE;

c. FORD, MAZDA, and DOES 1 through 100 failed to make necessary modifications to the design of the SUBJECT VEHICLE after receiving notice that the design of the SUBJECT VEHICLE was defective and unreasonably dangerous; and

d. FORD, MAZDA, and DOES 1 through 100 failed to adequately warn and instruct PLAINTIFFS and other purchasers and users of the SUBJECT VEHICLE and similar vehicles with respect to the hazards risks, and dangers of the SUBJECT VEHICLE;

e. FORD, MAZDA, and DOES 1 through 100 included false and misleading information in advertising that misrepresented the safety features of the vehicle associated with the restraint system and failed to adequately apprise prospective purchasers of the latent defects associated with the restraint system; and

f. FORD, MAZDA, and DOES 1 through 100 failed to recall and repair with two-point restraint system and other above-described defective components of the SUBJECT VEHICLE.

21. FORD, MAZDA, and DOES 1 through 50, as automobile manufacturers/assemblers, have known for decades about the dangers associated with lap-only seatbelts in frontal collisions. Despite this knowledge and the fact that frontal collisions account for over 60% of all collisions, FORD, MAZDA, and DOES 1 through 50 have engaged in despicable conduct by marketing the SUBJECT VEHICLE as safe, when it was not, and selling this unsafe vehicle to the public at large knowing that it was not safe, in willful and conscious disregard of the public's safety.

22. FORD and MAZDA's despicable conduct in willful and conscious disregard of the safety of their customers is evidenced by internal company documents:

a. In an intra-company communication dated September 19, 1967, almost 40 years ago, FORD concluded that "when properly worn,

a 3-point, diagonal shoulder belt system has been demonstrated to offer much greater protection to the vehicle occupant than does a single lap belt along, since it prevents injuries for jackknifing."

b. In a 1972 SAE paper written by FORD engineers William Shelton and Albert J. Hammond, FORD illustrates the substantial difference in injuries associated with lap belts versus three-point belts.

23. Despite the overwhelming evidence of the risks associated with lap belt only systems from *almost 40 years ago* to the present, FORD and MAZDA have repeatedly lobbied NHTSA to forego its suggested implementation of a new Federal Motor Vehicle Safety Standard which would have required three-point belts at all seating locations in motor vehicles sold to the public.

24. For example, in a letter dated January 30, 1989, from FORD to the National Highway Traffic Safety Administration("NHTSA"), FORD states: "*Ford believes lap/shoulder belts can provide superior protection to lap belts in most accident situations. Indeed, Ford had planned to voluntarily provide rear seat lap/shoulder belts in all of its vehicles as soon as that could safely and effectively be done, and all of Ford's major competitors had announced similar plans. Therefore, adoption of a requirement for rear seat lap/shoulder belts at this time would not improve motor vehicle safety.*" FORD made these false

statements to NHTSA when all of FORD's own testing of two-point lap belts suggested otherwise.

25. Based on information and belief, from January 1, 1979 to the present, FORD has had a substantial and/or controlling ownership interest in MAZDA. Many of MAZDA's automobiles are based in whole or in part on FORD's designs and technology, and vice versa. MAZDA and its employees were privy to the development and testing performed on two-point versus three-point seat belts performed by FORD. Therefore, FORD's knowledge of the dangers of two-point lap belts must be imputed to MAZDA.

26. AEM and DOES 1 through 100, manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the "Blue Ox" tow bar that was equipped on the motor home driven by Jack W. Bonzelaar. AEM and DOES 1 through 100, knew, or should have known, that the "Blue Ox" tow bar and its component parts would be purchased and used by consumers without inspection for defects or hazards.

27. At the time of its manufacture and retail sale by AEM and DOES 1 through 100, the "Blue Ox" tow bar was defective for its intended purposes and in its manufacture, design, and failure to warn of its propensities to allow a vehicle attached thereto to unhitch from the towing vehicle. In particular, jackknifing, which occurred to Bonzelaar's motor home and Jeep Wrangler, is a foreseeable occurrence to vehicles attached by a "Blue Ox" tow bar and it was

foreseeable that jack-knifing would cause failures of its components, including the draw bar assembly. AEM and DOES 1 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar.

28. As a proximate result of the hereinabove and hereinafter alleged acts, omissions, and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have been injured, sustaining temporary and permanent injuries to their body and nervous system, and severe mental and emotional pain and suffering, by virtue of their own injuries and by having witnessed the suffering and death of Thanh Williamson (*Dillon v. Legg* (1968) 68 Cal.2d 728), all to their general damage in an amount in excess of the minimum jurisdictional limits of the above-entitled Court and to be determined at trial.

29. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have incurred and will in the future incur medical expenses for, among other things, physicians, surgeons, medical and nursing attendants, hospital bills, x-rays and other medical care, in a sum to be determined at trial.

30. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100,

Plaintiff Delbert Williamson has suffered loss of wages and a loss of earning capacity, in a sum to be determined at trial.

31. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

32. As a proximate result of the death of Thanh Williamson, which occurred only after she suffered several hours of severe pain and suffering, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum to be determined at trial.

33. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have incurred various and sundry losses and expenses, in a sum to be determined at trial.

FIRST CAUSE OF ACTION FOR STRICT LIABILITY

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST MAZDA, FORD, AEM, AND DOES 1 THROUGH 100)

34. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

35. FORD, MAZDA and DOES 1 through 100 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the SUBJECT VEHICLE and its component parts. FORD, MAZDA and DOES 1 through 100 knew, or should have known, that the SUBJECT VEHICLE and its component parts would be purchased and used by consumers without inspection for defects or hazards.

36. At the time of its manufacture and retail sale by FORD, MAZDA and DOES 1 through 100 the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe as described in paragraph 19 above, and FORD, MAZDA and DOES 1 through 100 failed to warn PLAINTIFFS and other consumers of the these defects or hazards as described in paragraph 20 above.

37. AEM and DOES 1 through 100 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the "Blue Ox" tow bar that was equipped on the motor

home driven by Jack W. Bonzelaar. AEM and DOES 1 through 100 knew, or should have known, that the "Blue Ox" tow bar and its component parts would be purchased and used by consumers without inspection for defects or hazards.

38. At the time of its manufacture and retail sale by AEM and DOES 1 through 100, the "Blue Ox" tow bar was defective as described in paragraph 27 above, and AEM and DOES 1 through 100 failed to warn PLAINTIFFS and other consumers of the these defects or hazards.

39. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 28 through 33 above.

40. The above-alleged conduct of MAZDA, FORD, and DOES 1 through 100 was willful, intentional, malicious, fraudulent, oppressive, despicable, and/or reckless under ***Civil Code § 3294*** because they were aware of the probable consequences of the actions they took and deliberately chose to ignore the consequences. DEFENDANTS intended the consequences that were substantially certain to result from their conduct, and they were aware of the probable harmful consequences of their conduct and willfully and deliberately failed to avoid these consequences. Therefore, PLAINTIFFS are entitled to an award of punitive damages, and will seek such an award at trial in an amount to be proven at trial.

SECOND CAUSE OF ACTION FOR NEGLIGENCE

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS OF THANH WILLIAMSON, AGAINST MAZDA, FORD, AEM, AND DOES 1 THROUGH 100)

41. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

42. FORD, MAZDA, and DOES 1 through 100 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE and all components and sub-assemblies of the SUBJECT VEHICLE, including the restraint system and its components.

43. FORD, MAZDA, and DOES 1 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE as described herein.

44. AEM and DOES 1 through 100 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar and all components and sub-assemblies of the "Blue Ox" tow bar, including the draw bar assembly.

45. AEM and DOES 1 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar as described herein.

46. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 25 through 30 above.

THIRD CAUSE OF ACTION

FOR INTENTIONAL MISREPRESENTATION AND CONCEALMENT

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST MAZDA, FORD, AND DOES 1 THROUGH 100)

47. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

48. MAZDA, FORD, and DOES 1 through 100 represented to PLAINTIFFS and other consumers that the SUBJECT VEHICLE, including but not limited to its two-point lap belts, was safe in its operation, design and function.

49. MAZDA, FORD, and DOES 1 through 100 knew that the SUBJECT VEHICLE was at all relevant times defective because their own research

demonstrated that the two-point lap belt is unsafe and does not provide proper protection for passengers, leading to severe injuries and death.

50. Despite these known dangers to PLAINTIFFS and other consumers, FORD, MAZDA and DOES 1 through 100 marketed and advertised that the SUBJECT VEHICLE, including but not limited to its two-point lap belts, is safe and free from defects. These representations were materially false.

51. MAZDA, FORD, and DOES 1 through 100 intentionally suppressed material facts about the known dangerous propensities of the defects of the SUBJECT VEHICLE, including but not limited to its two-point lap belts, and the great likelihood of grave injury or death to passengers in a collision.

52. MAZDA, FORD, and DOES 1 through 100 were under a duty to disclose to PLAINTIFFS and other consumers all known material facts regarding defects in the SUBJECT VEHICLE, including but not limited to its two-point lap belts.

53. MAZDA, FORD, and DOES 1 through 100 intentionally concealed and suppressed the known material facts regarding defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects, with the intent to defraud and induce PLAINTIFFS and other consumers to purchase and use the SUBJECT VEHICLE.

54. PLAINTIFFS, as purchasers and users of the SUBJECT VEHICLE, reasonably and justifiably

relied on MAZDA, FORD, and DOES 1 through 100 misrepresentations and nondisclosures regarding defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects. Because of MAZDA, FORD, and DOES 1 through 100's material misrepresentations and nondisclosures, PLAINTIFFS lacked complete information regarding the defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects, and the likelihood of grave injury and/or death to passengers in the event of a collision.

55. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, FORD, AEM, and DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 28 through 33 above.

56. The above-alleged conduct of MAZDA, FORD, and DOES 1 through 100 was willful, intentional, malicious, fraudulent, oppressive, despicable, and/or reckless under ***Civil Code § 3294*** because they were aware of the probable consequences of the actions they took and deliberately chose to ignore the consequences. DEFENDANTS intended the consequences that were substantially certain to result from their conduct, and they were aware of the probable harmful consequences of their conduct and willfully and deliberately failed to avoid these consequences. Therefore, PLAINTIFFS are entitled to an award of punitive damages, and will seek such an award at trial in an amount to be proven at trial.

FOURTH CAUSE OF ACTION FOR WRONGFUL DEATH

(BY PLAINTIFFS DELBERT WILLIAMSON AND ALEXA WILLIAMSON AGAINST MAZDA, FORD, AEM, AND DOES 1 THROUGH 100)

57. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

58. As a proximate result of the death of Thanh Williamson, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum in excess of the minimum jurisdiction of the above-entitled court.

59. As a proximate result of the death of Thanh Williamson, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray for judgment against MAZDA, FORD, AEM, and DOES 1 through 100 as follows:

FIRST CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For punitive damages; and
6. For such other and further relief as the court deems just and proper.

SECOND CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof; and
5. For such other and further relief as the court deems just and proper.

THIRD CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For punitive damages; and

6. For such other and further relief as the court deems just and proper.

FOURTH CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof; and

5. For such other and further relief as the court deems just and proper.

JURY DEMAND

PLAINTIFFS hereby demand a trial by jury on all claims so triable.

DATED: September 29, 2004

GIRARDI | KEESE

By: /s/ David Lira
DAVID R. LIRA
Attorneys for
PLAINTIFFS

[Proof Of Service Omitted In Printing]

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Mazda North American Operations and
Ford Motor Company

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

DELBERT WILLIAMSON, ALEXA WILLIAMSON, THROUGH HER GUARDIAN AD LITEM, DELBERT WILLIAMSON AND THE ESTATE OF THANH WILLIAMSON, AND DOES 1 THROUGH 10, inclusive;

Plaintiffs,

vs.

MAZDA MOTOR OF AMERICA, INC. FORD MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, AND DOES 1-10 inclusive

Defendants.

Case No. 04CC06494

MAZDA NORTH AMERICAN OPERATIONS' ANSWER TO FIRST AMENDED COMPLAINT

Date Action Filed: June 7, 2004

Assigned to the Honorable Robert H. Gallivan – Department C 28

(Filed Jan. 5, 2005)

Defendant Mazda Motor of America, Inc. d/b/a Mazda North American Operations hereby answers the unverified complaint of plaintiffs as follows:

General Denial

1. Pursuant to Code of Civil Procedure section 431.30, defendant denies each and every allegation contained in each cause of action relating to this answering defendant. Defendant further denies that plaintiff has suffered any injury or damage of any kind attributable in any way to any act or omission of defendant.

First Affirmative Defense

(Failure to State a Cause of Action)

2. The complaint and each of its purported causes of action fail to state facts sufficient to constitute a claim upon which relief against this answering defendant can be based.

Second Affirmative Defense

(Statute of Limitations)

3. The complaint and each of its purported causes of action are barred by the applicable statute of limitations.

Third Affirmative Defense

(Failure to Mitigate)

4. Any recovery by plaintiffs should be reduced by their reason of failure to mitigate damages.

Fourth Affirmative Defense

(Comparative/Intervening Fault)

5. The acts about which plaintiff complains were the fault of careless, negligent, reckless, and unreasonable actions of plaintiff and/or third parties, whose actions caused, in whole or in part, the injuries or damages, if any, sustained by plaintiff. The comparative fault of plaintiff and/or intervening fault of third parties bars or reduces any liability of this answering defendant.

Fifth Affirmative Defense

(Misuse/Abuse of Product)

6. The Vehicle and Product alleged to be defective was misused and/or abused by the plaintiff or other parties.

Sixth Affirmative Defense

(Alteration of Product)

7. The Vehicle and Product alleged to be defective was altered and/or modified.

Seventh Affirmative Defense

(Joint and Several Liability Unconstitutional)

8. The imposition of joint and several liability is unconstitutional and violates the provisions of the United States Constitution and the California Constitution, including but not limited to, Defendant's rights to due process and equal protection of the law.

Eighth Affirmative Defense

(Punitive Damages Unconstitutional)

9. The imposition of punitive damages is unconstitutional and violates the provisions of the United States Constitution and the California Constitution, including but not limited to, Defendant's rights to due process and equal protection of the law.

Ninth Affirmative Defense

Defendant may have additional affirmative defenses available to it of which it is not now fully aware. Defendant reserves the right to assert affirmative defenses after the same shall have been ascertained.

WHEREFORE, defendant demands:

1. Plaintiffs take nothing from defendant;

2. The Court enter judgment dismissing the First Amended Complaint and each of its purported causes of action with prejudice;

3. Defendant be awarded costs of suit, including but not limited to reasonable attorney fees; and

4. Such further relief as the court deems proper.

Dated: January 4, 2005

THE LAW OFFICES OF
MARK O'CONNOR

By: /s/ Mark O'Connor
Mark O'Connor, Esq.
Attorney for Defendants
Mazda Motor of America,
Inc. d/b/a Mazda North
American Operations and
Ford Motor Company

[Proof Of Service And
Service List Omitted In Printing]

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Attorney for Plaintiffs

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING	**CASE NO. 04CC06494** Hon. Robert H. Gallivan (Dept. C31) **SECOND AMENDED COMPLAINT** 1. Strict Liability 2. Negligence 3. Intentional Misrepresentation and Concealment 4. Wrongful Death 5. Loss of Consortium **DEMAND FOR JURY**

COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive,

Defendants.

Plaintiffs DELBERT WILLIAMSON, ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson, and ESTATE OF THANH WILLIAMSON hereby allege as follows:

SUMMARY

1. On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driven by Jack W. Bonzelaar.

2. All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts. Thanh Williamson, however, was killed when the forces generated by this collision caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding. Her husband and daughter, Delbert and Alexa Williamson, were also injured in the accident due to

the defective and uncrashworthy design of the 1993 Mazda MPV Minivan.

PARTIES

3. Plaintiff Delbert Williamson is an individual who resides in the State of Utah and is the deceased Thanh Williamson's husband.

4. Plaintiff Alexa Williamson is who resides in the State of Utah and is Delbert Williamson and the deceased Thanh Williamson's daughter.

5. Plaintiff Estate of Thanh Williamson is the probate estate of the deceased Thanh Williamson and is represented by her Survivors, Delbert Williamson and Alexa Williamson.

6. Defendant MAZDA MOTOR OF AMERICA, INC. ("MAZDA AMERICA") is a California corporation, with its principle place of business in Irvine, California.

7. Defendant FORD MOTOR COMPANY ("FORD") is a Delaware corporation, with its principle place of business in Dearborn, Michigan.

8. Defendant AUTOMATIC EQUIPMENT MANUFACTURING COMPANY ("AEM") is a Nebraska corporation, with its principle place of business in Pender, Nebraska.

9. Defendant MAZDA MOTOR CORPORATION ("MAZDA") is a Japanese corporation, with its principle place of business in Hiroshima, Japan.

10. The true names and/or capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 100, inclusive, are unknown to PLAINTIFFS, who therefore sue said DEFENDANTS by such fictitious names. PLAINTIFFS are informed and believe, and upon such information and belief allege, that each of the DEFENDANTS fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to, and proximately caused the injuries and damage to PLAINTIFFS hereinafter alleged. PLAINTIFFS will seek leave of Court to Amend this Complaint to assert the true names and/or capacities of such fictitiously named DEFENDANTS when the same have been ascertained.

11. PLAINTIFFS are informed and believe, and thereupon allege, that at all times mentioned herein, DEFENDANTS, including DOES 1 through 100, were the agents, servants, employees and/or joint venturers of their co-DEFENDANTS, and were, as such, acting within the course, scope and authority of said agency, employment and/or joint venture, and that each and every DEFENDANT, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every DEFENDANT. as an agent, employee and/or joint venturer.

12. Defendants MAZDA, FORD, MAZDA AMERICA, and DOES 1 through 50, are at a times herein mentioned were engaged in the business of selling, manufacturing, designing, testing, engineering,

marketing, modifying, assembling, inspecting, distributing, and controlling Mazda MPV Minivans and other similar automobiles. MAZDA, FORD, MAZDA AMERICA, and DOES 1 through 50, market, distribute, sell, modify and repair their vehicles, including the 1993 Mazda MPV Minivan, within the County of Orange, State of California.

13. MAZDA, FORD, MAZDA AMERICA, and DOES 1 through 50, knew, expected and intended the 1993 Mazda MPV and other similar automobiles and/or substantially similar automobiles to be used for the purposes of transporting persons and property.

14. MAZDA, FORD, MAZDA AMERICA, and DOES 1 through 50, at all times herein mentioned knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles and/or substantially similar automobiles and their component parts would be purchased and used by the purchaser or user without inspection for defects or dangerous propensities or properties therein or in any of its component parts.

15. MAZDA, FORD, MAZDA AMERICA, and DOES I through 50, knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles, including its component parts, were highly dangerous and equipped with hazardous instrumentalities to person riding in them and/or in close proximity to them should such automobile, particularly its restraint systems, or any associated parts or components and/or the design, materials,

workmanship, configuration, or location thereof be in any manner defective or fail use.

GENERAL ALLEGATIONS

16. On August 14, 2002, Delbert Williamson, Thanh Williamson, and their daughter, Alexa Williamson, were traveling in their 1993 Mazda MPV Minivan ("SUBJECT VEHICLE"), heading north on Route 89 in Kane County, Utah. Delbert was driving the SUBJECT VEHICLE Thanh was sitting in the middle seat of the middle row of seats, and Alexa was sitting just behind Delbert in the middle row, next to her mother. Plaintiffs were all wearing their seatbelts, but whereas Delbert and Alexa were wearing three-point seatbelts, Thanh was only wearing a two-point seatbelt or lap belt.

17. Meanwhile, Jack W. Bonzelaar was driving a motor home, heading south on Route 89, towing a 1998 Jeep Wrangler using a "Blue Ox" tow bar. Suddenly, the Jeep Wrangler became detached from Bonzelaar's motor home and crossed the center divider line of Route 89, striking the SUBJECT VEHICLE being driven by Delbert Williamson.

18. As a proximate result of this collision, Thanh Williamson suffered fatal abdominal injuries and internal bleeding, Delbert Williamson suffered fractures to the right wrist, ankle and foot, and Alexa Williamson suffered abdominal contusions and mesenteric hematoma, requiring surgical intervention. These injuries would not have occurred or they would

not have been as severe had FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 designed the SUBJECT VEHICLE and its components to be safer and more crashworthy.

19. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, designed tested, engineered, manufactured, assembled, distributed, marketed and sold the SUBJECT VEHICLE.

20. At the time of its manufacture and retail sale by FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, the SUBJECT VEHICLE was defective, uncrashworthy, any unsafe for its intended purposes and uses in that, among other respects:

a. It was equipped with inferior and unsafe two-point lap belts in the middle seating positions, when it should reasonably have been equipped with three-point seat belts, as the remaining seats in the SUBJECT VEHICLE;

b. It was not equipped with a front bumper that did not contain sufficient energy-absorbing foam or similar substance, sufficient to absorb reasonable amounts of force from a collision;

c. It was not equipped with a horizontal bar in the driver's door, to protect against buckling and to permit the door latch to remain operational; and

d. Its front seating area lacked sufficient survival space, such that in a frontal

collision, the driver and front passenger's seats are dangerously compromised.

21. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE, as follows:

a. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 had knowledge, prior to the sale of the SUBJECT VEHICLE to PLAINTIFFS, of the dangers of two-point lap belts and failed to warn PLAINTIFFS and other consumers of such dangers;

b. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 failed to adequately evaluate the performance and crashworthiness of the SUBJECT VEHICLE;

c. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 failed to make necessary modifications to the design of the SUBJECT VEHICLE after receiving notice that the design of the SUBJECT VEHICLE was defective and unreasonably dangerous;

d. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 failed to adequately warn and instruct PLAINTIFFS and other purchasers and users of the

SUBJECT VEHICLE and similar vehicles with respect to the hazards, risks, and dangers of the SUBJECT VEHICLE;

e. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 included false and misleading information in advertising that misrepresented the safety features of the vehicle associated with the restraint system and failed to adequately apprise prospective purchasers of the latent defects associated with the restraint system; and

f. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 failed to recall and repair with two-point restraint system and other above-described defective components of the SUBJECT VEHICLE.

22. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 have known for decades about the dangers associated with lap-only seatbelts in frontal collisions. Despite this knowledge and the fact that frontal collisions account for over 60% of all collisions, FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 have engaged in despicable conduct in willful and conscious disregard of the safety of consumers by marketing and selling the SUBJECT VEHICLE as safe, when it was not, and failing to disclose to consumers the dangers associated with lap-only seatbelts in frontal collisions.

23. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, have conducted testing of lap-only seatbelts in comparison to three-point seatbelts. Those tests revealed that three-point seatbelts are far more effective in reducing abdominal, spinal, and other severe injuries in front collisions when compared to lap-only seatbelts. Despite this knowledge, FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 engaged in despicable conduct in willful and conscious disregard of the safety of consumers by choosing to utilize a lap-only seatbelt for the middle rear seat in the SUBJECT VEHICLE instead of a three-point seatbelt, even though three-point seatbelts were technically feasible at the time of the design and manufacture of the SUBJECT VEHICLE. Equipping the SUBJECT VEHICLE with a three-point seatbelt in the middle rear seat would have cost FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 a mere $12.00 per vehicle.

24. Various government-sponsored automotive safety institutes have given the 1993 Mazda MPV the lowest possible rating in crash tests, due in large part to its poor crashworthiness and defective lap-only seat belt.

25. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50's despicable conduct in willful and conscious disregard of the safety of consumers is further evidenced by internal company documents:

a. In an intra-company communication dated September 19, 1967, almost 40

years ago, FORD concluded that "when properly worn, a 3-point, diagonal shoulder belt system has been demonstrated to offer much greater protection to the vehicle occupant than does a single lap belt along, since it prevents injuries for jackknifing." MAZDA, MAZDA AMERICA, and DOES 1 through 50 knew about this information at the time of the design and manufacture of the SUBJECT VEHICLE.

b. In a 1972 SAE paper written by FORD engineers William Shelton and Albert J. Hammond, FORD illustrates the substantial difference in injuries associated with lap belts versus three-point belts. MAZDA, MAZDA AMERICA, and DOES 1 through 50 knew about this information at the time of the design and manufacture of the SUBJECT VEHICLE.

26. Despite the overwhelming evidence of the risks associated with lap belt only systems from *almost 40 years ago* to the present, FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 have repeatedly lobbied the National Highway Traffic Safety Administration ("NHTSA") to forego its suggested implementation of a new Federal Motor Vehicle Safety Standard which would have required three-point belts at all seating locations in motor vehicles sold to the public.

27. For example, in a letter dated January 30, 1989, from FORD to NHTSA, FORD states: "*Ford believes lap/shoulder belts can provide superior protection to lap belts in most accident situations. Indeed, Ford had planned to voluntarily provide rear seat lap/shoulder belts in all of its vehicles as soon as that could safely and effectively be done, and all of Ford's major competitors have announced similar plans. Therefore, adoption of a requirement for rear seat lap/shoulder belts at time would not improve motor vehicle safety.*" FORD made these false statements to NHTSA when all of FORD's own testing of two-point lap belts suggested otherwise.

28. Despite empirical medical/scientific evidence and urgings by NHTSA and the National Traffic and Safety Board ("NTSB"), FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 continued to manufacture vehicles equipped with lap-only belts. On August 8, 1986, the NTSB issued a safety recommendation to auto manufacturers. In this safety recommendation, the chairman of the NTSB noted that its own investigation concluded that *the crash performance of lap-only belts was "very poor."*

a. The NTSB went on to state: "Furthermore, *the Safety Board believes that it may be technically feasible to provide 3 - point, lap/shoulder belts at every seating location*; if so, such systems should be required as soon as possible. As long ago as the 1970s, the NHTSA proposed such

a requirement, at least for passenger cars."

b. The NTSB also stated: "It may be argued that the center front and center rear seating locations in passenger cars have the lowest rates of occupancy, and that therefore it is not warranted to provide the superior protection of lap/shoulder belts at these locations. *The Safety Board believes that, to the extent these seating positions are used, their occupants deserve crash protection equal to those provided for other occupants.*"

29. Based on information and belief, from January 1, 1979 to the present, FORD has had a substantial and/or controlling ownership interest in MAZDA. Many of MAZDA's automobiles are based in whole or in part on FORD's designs and technology, and vice versa. MAZDA and its employees were privy to the development and testing performed on two-point versus three-point seat belts performed by FORD. Therefore, FORD's knowledge of the dangers of two-point lap belts must be imputed to MAZDA.

30. AEM and DOES 50 through 100, manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the "Blue Ox" tow bar that was equipped on the motor home driven by Jack W. Bonzelaar. AEM and DOES 50 through 100, knew, or should have known, that the "Blue Ox" tow bar and its component parts would be

purchased and used by consumers without inspection for defects or hazards.

31. At the time of its manufacture and retail sale by AEM and DOES 50 through 100, the "Blue Ox" tow bar was defective for its intended purposes and in its manufacture, design, and failure to warn of its propensities to allow a vehicle attached thereto to unhitch from the towing vehicle. In particular, jack-knifing, which occurred to Bonzelaar's motor home and Jeep Wrangler, is a foreseeable occurrence to vehicles attached by a "Blue Ox" tow bar and it was foreseeable that jack-knifing would cause failures of its components, including the draw bar assembly. AEM and DOES 50 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar.

32. As a proximate result of the hereinabove and hereinafter alleged acts, omissions, and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have been injured: sustaining temporary and permanent injuries to their body and nervous system, and severe mental and emotional pain and suffering, by virtue of their own injuries and by having witnessed the suffering and death of Thanh Williamson (Dillon v. Legg (1968) 68 Cal.2d 728), all to their general damage in an amount in excess of the minimum jurisdictional limits of the above-entitled Court and to be determined at trial.

33. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have incurred and will in the future incur medical expenses for, among other things, physicians, surgeons, medical and nursing attendants, hospital bills, x-rays and other medical care, in a sum to be determined at trial.

34. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, Plaintiff Delbert Williamson has suffered loss of wages and a loss of earning capacity, in a sum to be determined at trial.

35. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

36. As a proximate result of the death of Thanh Williamson, which occurred only after she suffered several hours of severe pain and suffering, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum to be determined at trial.

37. As a proximate result of the hereinabove alleged acts, omissions and conduct of FORD,

MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have incurred various and sundry losses and expenses, in a sum to be determined at trial.

FIRST CAUSE OF ACTION FOR STRICT LIABILITY

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS OF THANH WILLIAMSON, AGAINST FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100)

38. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

39. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the SUBJECT VEHICLE and its component parts. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 knew, or should have known, that the SUBJECT VEHICLE and its component parts would be purchased and used by consumers without inspection for defects or hazards.

40. At the time of its manufacture and retail sale by FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe as described in paragraph 20 above, and FORD, MAZDA, MAZDA

AMERICA, and DOES 1 through 50 failed to warn PLAINTIFFS and other consumers of these defects or hazards as described in paragraph 21 above.

41. AEM and DOES 50 through 100 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the "Blue Ox" tow bar that was equipped on the motor home driven by Jack W. Bonzelaar. AEM and DOES 50 through 100 knew, or should have known, that the "Blue Ox" tow bar and its component parts would be purchased and used by consumers without inspection for defects or hazards.

42. At the time of its manufacture and retail sale by AEM and DOES 50 through 100, the "Blue Ox" tow bar was defective as described in paragraph 31 above, and AEM and DOES 50 through 100 failed to warn PLAINTIFFS and other consumers of the these defects or hazards.

43. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 32 through 37 above.

44. As alleged in paragraphs 22 through 29 above, the conduct of FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 constitutes malice, oppression, and fraud under Civil Code § 3294. Therefore, PLAINTIFFS are entitled to an award of punitive damages.

SECOND CAUSE OF ACTION FOR NEGLIGENCE

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST FORD MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100)

45. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

46. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE and all components and sub-assemblies of the SUBJECT VEHICLE, including the restraint system and its components.

47. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE as described herein.

48. AEM and DOES 50 through 100 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar and all components and sub-assemblies of the "Blue Ox" tow bar, including the draw bar assembly.

49. AEM and DOES 50 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the "Blue Ox" tow bar as described herein.

50. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100, PLAINTIFFS have suffered damages as alleged in paragraphs 32 through 37 above.

THIRD CAUSE OF ACTION

FOR INTENTIONAL MISREPRESENTATION AND CONCEALMENT

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST FORD MAZDA, MAZDA AMERICA, and DOES 1 through 50)

51. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

52. FORD, MAZDA, MAZDA AMERICA, and DOES I through 50 represented to PLAINTIFFS and other consumers that the SUBJECT VEHICLE, including but not limited to its two-point lap belts, was safe in its operation, design and function.

53. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 knew that the SUBJECT VEHICLE was at all relevant times defective because their own research demonstrated that the two-point lap belt is unsafe and does not provide proper protection for passengers, leading to severe injuries and death.

54. Despite these known dangers to PLAINTIFFS and other consumers, FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 marketed and advertised that the SUBJECT VEHICLE, including but not limited to its two-point lap belts, is safe and free from defects. These representations were materially false.

55. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 intentionally suppressed material facts about the known dangerous propensities of the defects of the SUBJECT VEHICLE, including but not limited to its two-point lap belts, and the great likelihood of grave injury or death to passengers in a collision.

56. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 were under a duty to disclose to PLAINTIFFS and other consumers all known material facts regarding defects in the SUBJECT VEHICLE, including but not limited to its two-point lap belts.

57. FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 intentionally concealed and suppressed the known material facts regarding

defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects, with the intent to defraud and induce PLAINTIFFS and other consumers to purchase and use the SUBJECT VEHICLE.

58. PLAINTIFFS, as purchasers and users of the SUBJECT VEHICLE, reasonably and justifiably relied on FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50's misrepresentations and non-disclosures regarding defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects. Because of FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50's material misrepresentations and nondisclosures, PLAINTIFFS lacked complete information regarding the defects of the SUBJECT VEHICLE, including but not limited to, the restraint system defects, and the likelihood of grave injury and/or death to passengers in the event of a collision.

59. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50, PLAINTIFFS have suffered damages as alleged in paragraphs 32 through 37 above.

60. As alleged in paragraphs 22 through 29 above, the conduct of FORD, MAZDA, MAZDA AMERICA, and DOES 1 through 50 constitutes malice, oppression, and fraud under Civil Code § 3294. Therefore, PLAINTIFFS are entitled to an award of punitive damages.

FOURTH CAUSE OF ACTION FOR WRONGFUL DEATH

(BY PLAINTIFFS DELBERT WILLIAMSON AND ALEXA WILLIAMSON AGAINST FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100)

61. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

62. As a proximate result of the death of Thanh Williamson, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum in excess of the minimum jurisdiction of the above-entitled court.

63. As a proximate result of the death of Thanh Williamson, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray for judgment against FORD, MAZDA, MAZDA AMERICA, AEM, AND DOES 1 through 100 as follows:

FIRST CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For punitive damages;
6. For such other and further relief as the court deems just and proper.

SECOND CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For such other and further relief as the court deems just and proper.

THIRD CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For punitive damages;
6. For such other and further relief as the court deems just and proper.

FOURTH CAUSE OF ACTION

1. For compensatory and general damages according to proof;
2. For special and incidental damages according to proof;
3. For costs of suits incurred herein;
4. For pre-judgment interest according to law and proof;
5. For such other and further relief as the court deems just and proper.

JURY DEMAND

PLAINTIFFS hereby demand a trial by jury on all claims so triable.

DATED: April 8, 2005 GIRARDI | KEESE

/s/ David R Lira
DAVID R. LIRA
Attorneys for PLAINTIFFS

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MAZDA MOTOR CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williams and Alexa Williamson,

Plaintiff,

vs.

MAZDA MOTOR OF AMERICA, Inc., FORD MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, and DOES 1-100, inclusive,

Defendants.

CASE NO. 04CC06494

Assigned: Hon. Robert H. Gallivan
Department: C31

MAZDA MOTOR CORPORATION'S ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT; DEMAND FOR JURY TRIAL

Action Filed: 7/7/04

Trial Date: None
Motion Cutoff: None
Discovery Cutoff: None

Defendant Mazda Motor Corporation, for itself alone, and for no other parties, answers the Second Amended Complaint of plaintiffs as follows:

Pursuant to California Code of Civil Procedure, Section 431.30, Mazda Motor Corporation denies each of the allegations contained in the Second Amended Complaint filed by plaintiffs and every cause of action of it, and further denies that plaintiffs have been damaged in any sum or sums, or at all.

FIRST AFFIRMATIVE DEFENSE

(Failure to State Cause of Action)

1. Neither the Second Amended Complaint nor any of the causes of action stated in it allege facts sufficient to constitute a cause of action against Mazda Motor Corporation.

SECOND AFFIRMATIVE DEFENSE

(Forum Non Conveniens)

2. Mazda Motor Corporation informed and believes, and on that basis alleges that Plaintiffs Complaint is improperly venued in a less convenient forum and the action should have been brought in a different venue or forum for the convenience of witnesses and the ends of justice.

THIRD AFFIRMATIVE DEFENSE

(Comparative Fault)

3. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs, plaintiffs' decedents, and others whose conduct is imputable to plaintiffs or plaintiffs' decedents, were negligent in and about the matters and things alleged in the Second Amended Complaint and that negligence and fault contributed directly and proximately to the happening of the incident and to plaintiffs' damages, if any, so that plaintiffs' recovery, if any, shall be diminished by the proportion of said negligence and fault.

FOURTH AFFIRMATIVE DEFENSE

(Assumption of Risk)

4. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs and/or plaintiffs' decedents at the time and place alleged in their Second Amended Complaint knowingly, voluntarily and freely placed themselves and their decedents in an unsafe and dangerous position, and therefore assumed all resulting risks of injuries.

FIFTH AFFIRMATIVE DEFENSE

(Third Party Liability)

5. Mazda Motor Corporation is informed and believes, and on that basis alleges that the damages plaintiffs allege, if any, were either wholly or partially

negligently caused or contributed to by the persons, firms, corporations, or entities other than, Mazda Motor Corporation either named or unnamed, and Mazda Motor Corporation is entitled to an apportionment among all such parties according to their responsibilities for such injuries and damages, if any, sustained by plaintiffs.

SIXTH AFFIRMATIVE DEFENSE

(No Joint or Several Liability)

6. Mazda Motor Corporation is informed and believes, and on that basis alleges that Mazda Motor Corporation's liability, if any, is limited pursuant to Utah Code Ann., Section 77-27-40 and/or California Civil Code, Section 1431 *et seq.* and any damages awarded to plaintiffs against Mazda Motor Corporation should be accordingly reduced.

SEVENTH AFFIRMATIVE DEFENSE

(Intervening/Superseding Actions)

7. Mazda Motor Corporation is informed and believes, and on that basis alleges that the injuries and damages allegedly sustained by plaintiffs or their decedents, if any, were the direct and proximate result of the intervening and superseding actions of third parties, whether named or unnamed, and not Mazda Motor Corporation.

EIGHTH AFFIRMATIVE DEFENSE

(State-of-the-Art)

8. Mazda Motor Corporation is informed and believes, and on that basis alleges that at the time the Mazda vehicle referred to in plaintiffs' Second Amended Complaint was originally sold and delivered, it comported with the state of the art at the time of manufacture.

NINTH AFFIRMATIVE DEFENSE

(Abuse/Alteration)

9. Mazda Motor Corporation is informed and believes, and on that basis alleges that the Mazda vehicle referred to in the Second Amended Complaint was abused and/or altered after being placed into the stream of commerce in a manner which was not reasonably foreseeable to Mazda Motor Corporation. That abuse and/or alteration reasonably caused or contributed to the happening of the alleged incident and to the injuries, loss, and damages, if any.

TENTH AFFIRMATIVE DEFENSE

(Misuse/Improper Maintenance)

10. Mazda Motor Corporation is informed and believes, and on that basis alleges that the Mazda vehicle referred to in the Second Amended Complaint was misused or improperly maintained. That misuse or improper maintenance reasonably caused or

contributed to the happening of the alleged incident and to the injuries, loss, and damages, if any.

ELEVENTH AFFIRMATIVE DEFENSE

(Mitigation of Damages)

11. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs have failed to mitigate their damages, if any, in the manner and to the extent required by law.

TWELFTH AFFIRMATIVE DEFENSE

(Failure to Preserve Evidence)

12. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs' claim is barred in whole or in part because plaintiffs, their counsel or their representatives knew of the existence or likelihood of litigation and failed to preserve crucial evidence.

THIRTEENTH AFFIRMATIVE DEFENSE

(Preemption)

13. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs' defect claims are barred, in whole or in part, by the doctrine of preemption.

FOURTEENTH AFFIRMATIVE DEFENSE

(Additional Warnings)

14. Mazda Motor Corporation is informed and believes, and on that basis alleges that no additional warnings would have, or could have prevented the alleged incident, the injuries, loss and damages alleged by plaintiffs.

FIFTEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

15. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs' claims are barred in whole or in part by the applicable statutes of limitation, included but not limited to Utah Code Ann., Sections 78-12-25(3), 78-12-25(2), and 70A-2-725(1) and/or California Code of Civil Procedure, Section 335.1 and California Commercial Code, Section 2725.

SIXTEENTH AFFIRMATIVE DEFENSE

(Prior Release)

16. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs are barred from maintaining this action because of a prior release.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Proper Notice)

17. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs are barred from maintaining an action for breach of warranty because plaintiffs failed to give proper notice within reasonable time after plaintiffs discovered, or should have discovered, such alleged breach of warranty, including, but not limited to the notice required by Utah Code Ann., Section 70A-2-607(3)(a).

EIGHTEENTH AFFIRMATIVE DEFENSE

(Compliance with Warranty)

18. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs are barred from maintaining an action for breach of warranty because the Mazda vehicle referred to in the Second Amended Complaint met or exceeded any and all applicable warranties.

NINETEENTH AFFIRMATIVE DEFENSE

(Lack of Privity)

19. Mazda Motor Corporation is informed and believes, and on that basis alleges that plaintiffs and plaintiffs' decedents are barred from maintaining an action for breach of warranty because they are not in privity of contract with Mazda Motor Corporation.

TWENTIETH AFFIRMATIVE DEFENSE

(Limited Warranty)

20. Mazda Motor Corporation is informed and believes, and on that basis alleges that by the applicable law and by the terms of the limited warranty for the subject vehicle, Mazda Motor Corporation is not liable for incidental, consequential, personal injury or emotional distress damages.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Failure to Join Indispensable Party)

21. Mazda Motor Corporation is informed and believes, and that basis alleges, that this action should be dismissed by this court based upon the failure of plaintiffs to join an indispensable party, the adverse driver, Jack Bonzelear.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Conformity with Governmental Standards)

22. Mazda Motor Corporation is informed and believes, and on that basis alleges, that to the extent the product in question conformed to applicable governmental standards, plaintiffs' claims are barred pursuant to Utah Code, Ann., Section 78-14-6(3).

TWENTY-THIRD AFFIRMATION DEFENSE

(Constitutionality of Punitive Damages)

23. Mazda Motor Corporation is informed and believes, and on that basis alleges that Plaintiffs' punitive damages claim violates various provisions of the United States Constitution, the Utah Constitution and the California Constitution.

First, actions such as this seeking the imposition of punitive damages under statutory and California judicial doctrines are essentially criminal in nature and entitle this answering defendant to the rights given to defendants in criminal proceedings under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 7, 15, and Article I, Section VII and Article I, Section X of the Utah Constitution and Article IV, Section 6, of the California Constitution.

Second, the procedures of law in this action which deny such rights to this answering defendant, including, among other things, (i) a requirement that the basis for the imposition of punitive damages be proven by plaintiff beyond a reasonable doubt, and (ii) a unanimous jury verdict in jury trials, violate this answering defendant's rights under such constitutional provisions.

Third, the provisions of Utah and California law limiting the amount of punitive damages which may be awarded in specified types of cases while allowing unlimited punitive damages for other tortuous

conduct, such as that alleged in this action, constitutes impermissible discrimination against those subject to unlimited punitive damage awards, such as this answering defendant, and in favor of those defendants not subject to unlimited punitive damage awards, in violation of Article IV, Section 2, of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7, and Article IV, Section 16, of the California Constitution.

Lastly, unless Madza Motors Corporation's liability, if any, for exemplary or punitive damages and the appropriate amount of exemplary or punitive damages and the appropriate amount of exemplary or punitive damages are established by clear and convincing evidence, any award of exemplary or punitive damages would violate Madza Motors Corporation's due process rights guaranteed by the Fourteenth Amendment to the Constitution of the United States, Utah Constitution Section I, Article VII and Utah Code Ann. §78-18-1 and by Article I, Section VII of the Constitution of the State of California, and would be improper under the common law and public policies of the States of Utah and California.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Constitutionality of Punitive Damages)

24. Under Utah Code Ann., Section 78-18-1, et seq., the State of Utah is entitled to receive a portion of any amount of damages awarded: excess of $20,000. As a result of the state's right to receive a

portion of punitive damages, the punitive damages are subject to the excessive finds or unusual punishment restrictions under the Eighth Amendment to the Constitution of the United States and Article I, Section IX of the Utah Constitution.

WHEREFORE, Defendant Mazda Motor Corporation prays as follows:

(1) Plaintiffs take nothing by their Second Amended Complaint;

(2) For judgment in favor of defendant Mazda Motor Corporation;

(3) For its costs; and,

(4) For such other and further relief as the court deems proper.

DATED: October 5, 2005

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Julian G. Senior
Attorneys for Defendant
MAZDA MOTOR
CORPORATION

DEMAND FOR JURY TRIAL

Mazda Motor Corporation demands a jury trial.

DATED: October 5, 2005

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Julian G. Senior
Attorneys for Defendant
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[Proof Of Service And Service List
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware corporation;	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** **DEFENDANT MAZDA MOTOR CORPORATION'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS** **[CCP 438 and common law]**

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**Date: July 6, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

PLEASE TAKE NOTICE that, on July 6, 2006 at 1:30 p.m. or as soon thereafter as the matter may be heard, in Department "C20" of the above-referenced Court, located at 700 Civic Center Drive West, Santa Ana, California, Defendant Mazda Motor Corporation ("MC") will and does hereby move the Court for an Order Granting Judgment on the Pleadings as to each cause of action, and the entirety of the Second Amended Complaint, as brought by the Estate of Thanh Williamson, and by Plaintiffs Delbert Williamson and Alexa Williamson to the extent that their claims arise from the death of Thanh Williamson. Authority for this Motion is found both in California Code of Civil Procedure section 438 and under the common law.

This Motion is based upon the grounds that Plaintiffs assert that the death of Thanh Williamson, seated in the center rear seat of the Mazda MPV, was directly attributable to the center rear seat being equipped with a lap safety belt, and not a lap and

shoulder belt. But Plaintiffs' claim directly conflicts with the choice that federal law gave to manufacturers to choose which type of safety belt they would install in those center seats. Thus, Plaintiffs' claims are an attempt to circumvent the primacy of federal law through state common (tort) law – an effort that is precluded by the doctrine of preemption. As such, Plaintiffs' claims are barred and fail to state facts sufficient to constitute a cause of action.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, all matters of which the Court may take judicial notice, including Federal Motor Vehicle Safety Standard 208, as set forth in the Federal Register and described in the attached Request for Judicial Notice, all other records and pleadings on file with the Court herein, and upon such further oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: June 13, 2006

BOWMAN AND BROOKE LLP
BY: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendant
MAZDA MOTOR
CORPORATION

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION: FEDERAL REGULATIONS, WHICH PREEMPT STATE TORT LAW, PERMITTED MANUFACTURERS THE CHOICE TO USE LAP BELTS IN REAR CENTER SEATS, SUCH AS THE ONE OCCUPIED BY THANH WILLIAMSON

To the extent that their claims derive from the death of Thanh Williamson, Plaintiffs claim that the 1993 Mazda MPV mini van in which they were riding was defective because it had one seat belt system authorized by federal law, and not another, in the rear center seat where Thanh Williamson was seated. At the time the MPV was manufactured, and indeed until a rule effective September 1, 2005, the federal motor vehicle occupant-restraint regulation, FMVSS 208 (49 CFR Section 571.208), gave manufacturers the option to use either a lap belt only or a lap/shoulder belt combination in the center rear seat. Although Mazda Motor Corporation ("MC") availed itself of the lap belt option, Plaintiffs allege it should have chosen the lap/shoulder belt combination. But the U.S. Supreme Court held that FMVSS 208 preempts state-law claims based on an exercise of options granted by FMVSS 208. *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861.

Based on *Geier,* it is clear that claims like Plaintiffs make, to the extent based upon the death of Thanh Williamson, are preempted because they would take away the authorized option to use a lap

belt only. As such, each cause of action by Plaintiffs based on the death of Thanh Williamson is barred, and judgment on the pleadings should be granted.

II. FACTS

A. Accident Background and Plaintiffs' Allegations

Plaintiffs Delbert Williamson and Alexa Williamson allege that on August 14, 2002, they and the decedent Thanh Williamson were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a Utah highway, after the Jeep detached from a motor home being driven by Jack W. Bonzelaar. Second Amended Complaint ("SAC"), ¶¶ ___.

Plaintiffs alleged that they and Thanh Williamson were all wearing seat belts. Further, they claim that Thanh Williamson "was killed when the forces generated by this collision caused her body to 'jackknife' around her defective lap belt, causing severe abdominal injuries and internal bleeding." SAC, ¶ 2. Plaintiffs initiated this case on June 7, 2004, and filed the operative SAC on or about June 27, 2005. In that SAC, Plaintiffs alleged that the manufacturer of the Mazda MPV was MC. SAC, ¶ 12.

Plaintiffs' claim as to the seat belt is described as follows: "It was equipped with inferior and unsafe two-point lap belts in the middle seating positions,

when it should reasonably have been equipped with three point seat belts. . . ." SAC, ¶20. (See discussion of these types of safety belts below.) Plaintiffs have made it clear that their claim, as it relates to Thanh Williamson derives from the two-point seat belt. (See RJN ¶1.)

B. History of Pertinent Safety Belt Regulations

Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") sets forth requirements for passenger restraints in "trucks and multi-purpose passenger vehicles" (a category that includes passenger vans like the Mazda MPV at issue here). Only recently (December 8, 2004, effective September 1, 2005) has NHTSA promulgated a rule requiring that rear center seats have the "Type 2 integral lap/shoulder safety belts" claimed as mandatory by Plaintiffs instead of a "Type 1 lap belt." See RJN Exh. "A," Final Rule Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 69 Federal Register No. 235, p. 70904.[1]

The Notice of Proposed Rulemaking ("NPRM") which necessarily preceded the rule summarizes the history of rear center seat safety belt requirements,

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[1] A Type 1 belt, a pelvic restraint, reaches from one side of the pelvis to the other, and thus has 2 points; a Type 2 belt adds a third point, the upper torso, and thus is referred to as a 3-point restraint.

showing that there *was no requirement* prior to this rule that a manufacturer equip center seats with the Type 2 belts. NHTSA "first addressed mandatory lap/shoulder belts for rear seats in 1984. . . ." See RJN Exh. "B," Notice of Proposed Rulemaking, Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 68 Federal Register No. 151, pp. 46546-46547. "While NHTSA acknowledged that a lap/shoulder belt would offer additional protection, it concluded that rear lap belts already provided effective protection to occupants in the rear seat. It also concluded that the cost associated with a rear lap/shoulder belt would be too great, given the low rate of belt use in the rear seat." *Id.* at p. 46547.

In June 1989, NHTSA published a rule "establishing a new requirement mandating lap shoulder belts for forward-facing rear outboard seating positions" for passenger vehicles. In November, that requirement was extended to other vehicles, including "multi-purpose vehicles like passenger vans." *Id.* But in both these rules, "center seating positions and non-forward-facing seating positions were excluded from the requirements." *Id.*

It was not until the current rule, effective September 1, 2005, that NHTSA required multi-purpose vehicles, such as the Plaintiffs' passenger van, to have rear center seats with Type 2 safety belts. Thus, the 1993 Mazda MPV's rear center seat restraint system – a Type 1 lap belt – was fully compliant not only with the standards set then, but with the standards that existed until September 1,

2005 and to be fully implemented by September 1, 2007. See RJN Exh. "A," *supra,* 69 Federal Register No. 235 at p. 70910.

III. PLAINTIFFS' CLAIMS CONFLICT WITH FEDERAL LAW

Under the United States Constitution, federal law is "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary Notwithstanding." U.S. Const. art. VI, cl. 2. Federal law preempts state law where (1) the state law conflicts with federal law; (2) the federal law occupies a field, and the state law falls within that field; or (3) federal law expressly preempts the state law. *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516; *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 153.

Here, Plaintiff's state-law claims conflict with FMVSS 208, a federal regulation. State law conflicts with federal law, and is preempted, where, *inter alia,* "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Dowhal, supra,* 32 Cal.4th at 923; *Geier v. American Honda Motor Co., supra,* 529 U.S. at 873. Where state law conflicts with federal law, state law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant*

Employees and Bartenders Int'l. Union (1984) 468 U.S. 491, 501. State law that conflicts with federal law is "without effect." *Cipollone v Liggett Group, Inc.*, supra, 505 U.S. at 516.

Here, Plaintiffs' claims, and the theory of tort law upon which they are founded, "stand as an obstacle" to implementation of FMVSS 208. As such, FMVSS 208 preempts a claim, like plaintiffs', that would impose a duty to use a lap/shoulder belt where FMVSS 208 granted the option to provide *either* a lap only belt or a lap/shoulder belt. See, e.g., *Hurley v. Motor Coach Indus., Inc.* (7th Cir. 2000) 222 F.3d 377, *cert. den.* (2001) 531 U.S. 1148; *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, *cert. den.* (2003) 538 U.S. 1023.

A. FMVSS 208 Provides Options to Promote Safety

"Standard 208 was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems for passengers." *Pokorny v. Ford Motor Co.* (3d Cir. 1990) 902 F.2d 1116, 1123. Accordingly, it is well settled that when FMVSS 208 grants a compliance option to advance federal goals, it preempts claims that would take those options away. The Supreme Court addressed the issue in *Geier v. American Honda Motor Co., supra*, 529 U.S. 861. The version of FMVSS 208 in that case gave manufacturers options among passive restraints (including the choice to

install either automatic seat belts or airbags), and also mandated a "gradual passive restraint phase-in" of passive restraints (allowing manufacturers to choose between manual belts and passive restraints on many cars). *Geier*, 529 U.S. at 881. The plaintiff in *Geier* sued the vehicle manufacturer for exercising its option to use manual seat belts rather than airbags.

The Supreme Court held this claim preempted because the claim would interfere with the choices deliberately granted by FMVSS 208 to serve safety. The Court explained that in adopting the version of FMVSS 208 applicable there, the Department of Transportation and its highway-safety agency, the National Highway Traffic Safety Administration ("NHTSA") "deliberately sought variety – a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and *allowing manufacturers to choose among different passive restraint mechanisms*, such as air bags, automatic belts, or other passive restraint technologies to satisfy that requirement." *Id.* at 878-79 (emphasis added). Those options, federal regulators determined, were necessary to serve safety; the "*range of choices among different passive restraint devices* . . . would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote FMVSS 208's safety objectives." *Id.* at 875 (emphasis added). Moreover,

the Secretary of Transportation "had *rejected* a proposed FMVSS 208 'all airbag' standard because of safety concerns (perceived or real) associated with airbags. . . ." *Id.* at 879 (emphasis in original).

Similarly, the Court held, NHTSA intended to phase passive restraints in gradually, and to preserve the option to install manual seat belts for cars not yet required to have passive restraints, for safety reasons: among other things "the phased-in requirement would allow more time for manufacturers to develop air bags or other, better, safer passive restraint systems," would "help develop information about the comparative effectiveness of different systems," and "would promote public acceptance" of new restraint technologies. *Id.* at 879, 881. The Court (quoting NHTSA) summed up that FMVSS 208 "*embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed alternative protection systems* in their fleets *rather than one particular system* in every car." *Id.* at 881 (emphasis added).

Geier recognized that this method of promoting safety would be undermined if state common-law rules could impose a duty on manufacturers to choose one option over another. Such rules would undercut "the variety and mix of devices" federal regulators sought as a means of promoting safety and "would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Id.* Such claims conflict with federal regulations, and so are not allowed: "Because

the rule of law for which petitioners contend would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed, it is pre-empted." *Id.* at 881-82 (citing *Hines v. Davidowitz* (1945) 312 U.S. 52). The Court thus held that plaintiff could not pursue a claim that her car was defective because the manufacturer had chosen to install manual seat belts rather than air bags.

In so holding, *Geier* thus affirmed that FMVSS 208 – both the version that granted options among passive restraints and the earlier versions that granted the option to choose between belt systems – preempts claims that punish the exercise of an option specifically granted by FMVSS 208 to serve safety. *See Hurley, supra* (*Geier* preempts claim based on exercise of one FMVSS 208 option rather than another); *Griffith, supra* (same); *James v. Mazda Motor Corp.* (11th Cir. 2000) 222 F.3d 1323, 1325-27 (same), *cert. den.* (2001) 531 U.S. 921; *Hernandez-Gomez v. Volkswagen of America, Inc.* (Ariz. Ct. App. 2001) 32 P.3d 424, 427-428, *cert. den.* (2002) 537 U.S. 1046 ("we read *Geier* as holding that FMVSS 208 gave manufacturers an unfettered choice among [the listed] options and precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option."); *Anthony v. Abbott* (D. V.I. 2003) 289 F.Supp.2d 667, 669 (no-side-airbag claim preempted by FMVSS 208 and *Geier* based on conflict with "option of choosing among several different passive restraint mechanisms"); *Carrasquilla*

v. Mazda Motor Corp. (M.D. Pa. 2001) 166 F.Supp.2d 169, 177 (plaintiffs' claim, a "direct attack against defendants for [their] exercise of an option under FMVSS 208," was preempted under *Geier* as "'an obstacle' to the accomplishment and execution of the purposes and objectives of the Safety Act and FMVSS 208, namely the objective of providing manufacturers with flexibility in choosing a restraint system"). *See also Irving v. Mazda Motor Corp.* (11th Cir. 1998) 136 F.3d 764, 769 (federal law preempts claim that car was defective because manufacturer used one FMVSS 208-authorized belt system instead of another; "Plaintiffs' suit against Defendants for their exercise of an option provided to Defendants by FMVSS 208 conflicts with federal law and, thus, is preempted."); *Pokorny*, 902 F.2d at 1116 (same).

Geier also confirmed the propriety of the holding 11 years earlier in *Nissan Motor Corp. v. Superior Court (Meier)* (1989) 212 Cal.App.3d 980, 982. There, the Court of Appeal held that FMVSS 208 preempts a "no airbag" claim which sought liability for the manufacturer's exercise of its option to use a safety belt only.

B. FMVSS 208 Preempts Claims, Like Plaintiffs', That Would Impose a Duty to Use Lap/Shoulder Belts Instead of Lap Belts

Following *Geier,* case law holds that FMVSS 208 preempts claims, like plaintiffs' here, that would take

away FMVSS 208's choice between a lap belt or a lap/shoulder combination. For example, in *Hurley, supra,* 222 F.3d 377, a bus driver argued that his bus was defectively designed because it provided only a two-point lap belt. 222 F.3d at 378, 381. Plaintiff claimed, *inter alia,* that defendant should have installed a three-point belt. 222 F.3d at 380-81. The Seventh Circuit held that FMVSS 208 and *Geier* preempted the suit:

> NHTSA's decision to leave the manufacturers . . . with the option of using a two point seat belt that met regulatory standards is quite understandable as a way of promoting safety by encouraging drivers to use the safety equipment that manufacturers install. But [plaintiff's] proposal unequivocally requires a three point seat belt, a requirement that could reduce utilization and thereby undermine FMVSS 208's safety objectives. . . . The point is that, as in *Geier,* the decision to leave options open to bus manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective and is therefore preempted.

222 F.3d at 382. Thus, the court continued, "*Geier* confirms . . . that a state lawsuit that forecloses an option left open by FMVSS 208 is in fact preempted." *Id.* at 382. "We conclude that the Supreme Court's opinion in *Geier* governs Hurley's case and compels the conclusion that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice

of safety device options, a state suits [sic] that depends on foreclosing one or more those [sic] options is preempted." *Id.* at 383.

Similarly, *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, *cert. den.* (2003) 538 U.S. 1023, held that *Geier* and FMVSS 208 preempted a claim that would impose liability for using a two-point belt rather than a three-point belt. FMVSS 208 allowed GM the option to install either a two-point lap belt or a three-point lap/shoulder belt for plaintiff's seating position. 303 F.3d at 1278. GM had chosen the lap belt. 303 F.3d at 1278. Plaintiffs claimed that the vehicle was "defective because of the lap belt only design" for plaintiff's position. 303 F.3d at 1278, 1279. The Eleventh Circuit held that the claim was preempted because it would take away the FMVSS 208 option to use a lap-only belt, and require the manufacturer to use the lap/shoulder combination belt instead. FMVSS 208 "does not mandate any particular type of restraint, but rather requires manufacturers to choose from several specific options in installing a restraint system in their passenger cars and trucks." *Id.* at 1279. Under FMVSS 208, General Motors was "free to install . . . either a lap belt for pelvic restraint or a shoulder/lap belt combination system." *Id.* "If successful, [plaintiff's] suit would foreclose an option specifically permitted by FMVSS 208. Therefore, it conflicts with that federal law and is impliedly preempted." 303 F.3d at 1282.

Still again, the Massachusetts Court of Appeals held that FMVSS 208 preempted based on failure to use a lap/shoulder belt combination in *Heinricher v. Volvo Car Corp.* (Mass. App. 2004) 809 N.E.2d 1094. Plaintiff there was "wearing a two-point lap belt" and riding in the rear seat of a Volvo sedan. 809 N.E.2d at 1095. The plaintiff sued in negligence and breach of warranty, asserting that the vehicle "was defective because it lacked a three-point lap-shoulder harness in the rear center seat" that he occupied. 809 N.E.2d at 1095. Following *Geier*, *Griffith*, and *Hurley*, the court held that FMVSS 208 "plainly provided Volvo . . . with the option of installing *either* a two-point lap belt *or* a three-point lap-shoulder harness in the rear center seat of its vehicles." 809 N.E.2d at 1098. Plaintiffs' action "would hold the defendants liable for choosing one Federally-approved passenger restraint system over another." 809 N.E.2d at 1098. That "would conflict with and stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in Standard 208," so plaintiffs' claims "are preempted as a matter of law." 809 N.E.2d at 1098.

This case is the same. FMVSS 208 granted MC the option to use a lap-only belt or a lap/shoulder belt combination. Mazda chose to use the lap-only belt. Plaintiff seeks to impose a duty to use the lap/shoulder belt. That is the exact claim held preempted by *Hurley, Griffith* and *Heinricher,* and takes away the federally-granted option just as in *Geier*. It accordingly remains preempted here.

C. A Duty to Use Three-Point Belts Would Have Interfered With FMVSS 208's Objectives

Even aside from the case law holding that a no-three-point-belt claim is preempted, such a claim is necessarily preempted because it would interfere with FMVSS 208's method of achieving federal goals. "A state law is also preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Int'l Paper Co. v. Ouellette* (1987) 479 U.S. 481, 494. Here, the Secretary of Transportation deliberately gave manufacturers the choice to use two-point belts in the rear seat as a method of promoting safety. The claimed state-law duty not to use two-point belts would interfere with the Secretary's method, and so is preempted.

Specifically, as noted in the historical portion of the current rule quoted above, in 1984, the Secretary of Transportation, through NHTSA, rejected a petition to require three-point belts in the rear seat. "While NHTSA acknowledged that a lap/shoulder belt would offer additional protection, it concluded that rear lap belts already provided effective protection to occupants in the rear seat. It also concluded that the cost associated with a rear lap/shoulder belt would be too great, given the low rate of belt use in the rear seat." See RJN Exh. "B," Notice of Proposed Rulemaking, Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 68 Federal Register No. 151, p. 46547 (citing 49 Fed. Reg. 15241 (April 18, 1984), attached as Exh. "C" to the RJN.) NHTSA recounted that

FMVSS 208 "currently permits manufacturers to install either Type 1 seat belts (lap belts) or Type 2 seat belts (lap and shoulder combination belts) in the rear seating positions of passenger cars." 49 Fed. Reg. 15241.

In 1989, as the history further relates, NHTSA mandated the Type 2 belts for certain rear seats, but in the two rules promulgated that year, rejected a requirement that "center seating positions and non-forward-facing seating positions" have Type 2 belts, leaving manufacturers the option of using Type 1 or Type 2 belts. As to center seating positions, this decision was made in part, NHTSA writes, because of "the relatively small projected benefits . . . and the potential costs and technical difficulties associated with anchoring the shoulder portion of the belt at the center seating position." RJN Exh. "B," Notice of Proposed Rulemaking, Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 68 Federal Register No. 151, p. 46547.

Thus, as in *Geier,* the Secretary through NHTSA had evaluated safety concerns and rejected mandatory Type 2 (3-point) belts at rear center seating positions. See *Geier*, *supra*, 529 U.S. at 879, 881. Plaintiffs' assertion of MC's alleged duty to use three-point belts would have removed from the marketplace the two-point belts on which the Secretary's policy depended. *See Int'l Paper Co., supra,* 479 U.S. at 484 (state law preempted if it interferes with federal method of achieving goal). Put differently, NHTSA's decision to let manufacturers use a lap-belt-only

system "was made with specific policy objectives. [Plaintiff's] suit, if successful, would undermine that policy objective and is therefore preempted." *Hurley*, 222 F.3d at 382; *Griffith*, 303 F.2d at 1282; *Heinricher*, 809 N.E.2d at 1098. *See also Geier*, 529 U.S. at 881 (claim preempted where it "would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed").

IV. CONCLUSION

Under the doctrine of preemption, this Court should grant MC's motion.

Dated: June 13, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD	**CASE NO. 04CC06494** Hon. Michael Brenner (Dept. C-20) **PLAINTIFFS' OPPOSITION TO MAZDA MOTOR CORPORATION'S MOTION FOR JUDGMENT ON THE PLEADINGS** (Filed Jun 22, 2006) [Filed concurrently with Plaintiffs' Request for Judicial Notice]

MOTOR COMPANY, AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, and DOES 1-100, inclusive, Defendants.	DATE: July 6, 2006 TIME: 1:30 P.M. DEPT.: C-20 Complaint filed: July 7, 2004 Trial date: August 7, 2006

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Mazda Motor Corporation's ("MAZDA") motion seeks an Order granting Judgment on the Pleadings as to: (1) every claim brought by the Estate of Thanh Williamson and (2) every claim arising out of the death of Thanh Williamson. (Notice of Motion at 1-2.)

At the outset, MAZDA's motion fails for the simple reason that those claims do not rest entirely on the allegation that MAZDA should have employed lap/shoulder belts at the rear center seating position – those claims also arise out of the allegation that the MPV was not sufficiently crashworthy, i.e. was not designed to absorb reasonable amounts of force from a collision. (Request for Judicial Notice ["RFJN"], Ex. 1, Second Amended Complaint ["SAC"], ¶¶ 2, 18, 20(b).) For this reason alone, MAZDA's motion cannot possibly be granted because it fails to address the allegations concerning crashworthiness.

With this motion, MAZDA is attempting to avoid liability for its failure to install three point lap/shoulder belts in the rear center seat of its MPV minivan, *even though it knew three point belts were the safest form of seat belt technology,* simply because it complied with *a minimum* federal standard that gave car makers the *option* of installing either lap/shoulder belts or lap-only belts in that seating position. There is no support for this proposition in either California law or the United States Supreme Court's decision in *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861.

To the contrary, the *Geier* decision held that Plaintiffs' claims arising out of the lack of a lap/shoulder belt in the rear center seat are expressly and unequivocally exempted from federal preemption by the "savings" clause of the Federal Motor Vehicle Safety Act. This holding has been affirmed by subsequent Supreme Court decisions. See *Bates v. Dow Agrosciences LLC,* (2005) 544 U.S. 431 (plaintiffs claims against manufacturer of pesticide are not preempted by the labeling provision of Federal Insecticide, Fungicide, and Rodenticide Act because of its savings clause); *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51 (federal agency's decision to not require a particular safety feature based on economic considerations and the lack of a "universal" technical solution suitable for use on all vehicles does not have any preemptive effect.)

Accordingly, MAZDA's motion for judgment on the pleadings must be denied.

II. SUMMARY OF FACTS

On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driver by Jack W. Bonzelaar. (SAC ¶ 1.)

All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts, but Thanh Williamson was killed when the forces generated by this collision caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding and Delbert and Alexa Williamson were also injured due to the vehicle's defective and uncrashworthy design. (SAC ¶ 2.)

The Second Amended Complaint alleges the following defects in the vehicle:

a. It was equipped with inferior and unsafe two-point lap belts in the middle seating positions, when it should reasonably have been equipped with three-point seat belts, as the remaining seats in the SUBJECT VEHICLE;

b. It was not equipped with a front bumper that did not contain sufficient energy-absorbing foam or similar substance,

sufficient to absorb reasonable amounts of force from a collision;

c. It was not equipped with a horizontal bar in the driver's door, to protect against buckling and to permit the door latch to remain operational; and

d. Its front seating area lacked sufficient survival space, such that in a frontal collision, the driver and front passenger's seats are dangerously compromised.

(SAC ¶ 20(a)-(d).)

In addition, PLAINTIFFS' subsequently discovered that the angle and geometry of the seat bottom and integrity of the seat back of the rear seat in which Thanh and Alexa Williamson were seated during the accident were also defective and contributed to their injuries. PLAINTIFFS identified these defects in discovery responses served on June 17, 2005. (RRFJN, Ex. 2, at 4.)

III. MAZDA'S MOTION MUST BE DENIED AT THE OUTSET BECAUSE IT FAILS TO ADDRESS EVERY BASIS FOR PLAINTIFFS' CLAIMS ARISING OUT OF THE DEATH OF THANH WILLIAMSON.

MAZDA's Notice for this motion states that it is seeking "an Order Granting Judgment on the Pleadings as to each cause of action, and the entirety of the Second Amended Complaint, as brought by the

Estate of Thanh Williamson, and by Plaintiffs Delbert Williamson and Alexa Williamson to the extent that their claims arise from the death of Thanh Williamson." (Notice of Motion at 1:27-28 through 2:1-2.)

A notice of motion must state in the first paragraph exactly what relief is sought and why (the grounds). Code of Civil Procedure § 1010; CRC 311(a); *People v. American Sur. Ins. Co.* (1999) 75 Cal.App.4th 719, 726. The court cannot grant different relief, or relief on different grounds, than those stated in the notice of motion. *American Sur. Ins. Co., supra,* 75 Cal.App.4th at 726; *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1124.

Here, PLAINTIFFS' claims arising out of the death of Thanh Williamson do not rest exclusively on the allegation that MAZDA should have employed three point belts at the rear center seating position-*those claims also arise out of the allegation that the MPV was not sufficiently crashworthy*, i.e. was not designed to absorb reasonable amounts of force from a collision. (SAC, ¶¶ 2, 18, 20(b).) Since MAZDA's notice of motion and attached memorandum of points and authorities fail to address the issue of crashworthiness, this motion must be denied.

IV. PLAINTIFF'S CLAIMS REGARDING THE LACK OF A THREE-POINT SEAT BELT ARE EXPRESSLY EXEMPTED FROM PREEMPTION BY THE SAVINGS CLAUSE OF THE FEDERAL MOTOR VEHICLE SAFETY ACT.

A. Legal Standard Governing Federal Preemption.

As the U.S. Supreme Court has instructed, a party arguing for preemption of state law bears a heavy burden of overcoming the long-standing "presume[ption] that Congress does not cavalierly preempt state-law causes of action." *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485. This burden is especially heavy where, as here, preemption would displace the historic power of the states to protect the health and safety of their citizens. *Id.* at 485. This presumption applies equally to claims of express or implied preemption. *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 958, fn. 11. Where preemption of common-law claims would leave injured individuals without any state or federal remedy, which is the result sought by MAZDA here, a court may find preemption only in the most compelling circumstances. See *English v. General Electric Corp.*, 496 U.S. 72, 87-90; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)

B. Background of Federal Motor Vehicle Safety Standards

In 1996, Congress passed the National Traffic and Motor Vehicle Safety Act of 1996, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve that goal, Congress empowered the federal Department of Transportation to issue minimum safety standards for motor vehicle performance. See 15 U.S.C. §§ 1391(2), 1392(a). The Department, in turn, delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. NHTSA fulfilled its responsibility by promulgating the Federal Motor Vehicle Safety Standards ("FMVSS") published at 49 C.F.R. §§ 571.1-.302. The FMVSS are *minimum* standards that a vehicle must meet in order to be sold in the United States.

Most of the FMVSS are "performance" standards, which set forth how a vehicle must perform under certain circumstances. The most recognizable example of a performance standard is the crash testing section of FMVSS 208, which specifies the maximum injury criteria levels for crash test dummies in particular types of barrier impacts. The FMVSS also contain "design" standards, which dictate the parameters of how certain components are actually designed or placed in the vehicle. One example of a design standard is FMVSS 210, which

dictates certain zones in which seat belt anchors must be installed.

The Safety Act also includes a "savings" clause that provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, the U.S. Supreme Court construed this clause as evidencing Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

C. The History of the Rear Center Seat Option of FMVSS 208.

At the time the MAZDA MPV at issue was manufactured, FMVSS permitted auto manufacturers to install either two-point lap belts (a "Type 1" system) or three-point lap/shoulder belts (a "Type 2" system) in the rear-center seats of their cars. See 49 C.F.R. § 571.208 S.4.1.4.2. (1990). Since MAZDA's motion rests on this version of FMVSS 208, it is important to understand its evolution in some detail.

The relevant version of FMVSS 208 first took effect in 1968, when NHTSA passed its initial set of motor vehicle safety standards. See 32 Fed. Reg. 2408 (February 3, 1967). At that time, FMVSS 208 required the installation of lap/shoulder belts at the drivers' and right-front passengers' seating positions,

and either lap belts or lap/shoulder belts at every other designated seating position (i.e. the center front seat and all rear seats). *Id.* at 2415. In the preamble accompanying the final rule, NHTSA characterized this rule as a "minimum safety standard" within the meaning of the Safety Act. 32 Fed. Reg. at 2408. The regulatory preamble contained no further explanation or statement of policy with respect to the agency's decision to give car makers the option of installing either lap belts or lap/shoulder belts in rear seating positions. *See id.*

In 1986, the National Transportation Safety Board ("NTSB") issued a Safety Recommendation with respect to lap/shoulder belts. (RFJN, Ex. 3, NTSB Safety Recommendations to "Foreign Manufacturers.") Among other things, the NTSB concluded that "[l[ap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury. . . ." (See RFJN, Ex. 3, at 4.) The NTSB further observed that "such systems appear to work effectively even for children, and they can be used with child safety seats and booster seats." *Id.* The NTSB ultimately recommended that, "[g]iven the known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems." (See RFJN, Ex. 3, at 5.) With respect to the industry, the NTSB

recommended that "early action ... be taken to provide aftermarket retrofit assemblies to convert lap/only belts to lap/shoulder belts." *Id.* The NTSB further found that such "retrofit assemblies" may be technically feasible "at very [sic] seating location," including rear-center seats. (See RFJN, Ex. 3, at 6.) With respect to new cars, the NTSB recommended that all rear seats – including rear center seats – be equipped with lap-shoulder belts. *Id.*

In 1988, NHTSA proposed to amend FMVSS 208 to require lap/shoulder belts in all rear outboard seating positions of passenger cars. See 53 Fed. Reg. 47982 (November 29, 1988). In its Notice of Proposed Rulemaking, NHTSA stated that it had decided not to propose a rear-center seat requirement based on manufacturers' complaints that the costs of installing lap/shoulder belts in rear-center seats might exceed the anticipated safety benefits. See *id.* at 47984. At no point did NHTSA state that lap/shoulder belts would be unsafe in rear-center seats, or that it affirmatively sought to give car makers the unfettered choice between installing lap belts or lap/shoulder belts in that seating position. To the contrary, it emphasized that "[r]ear seat lap/shoulder belts are estimated to be more effective than rear seat lap belts in reducing fatalities and moderate-to-severe injuries." *Id.* at 47982.

In 1989, NHTSA published a final rule requiring lap/shoulder belts in all rear-outboard seats, but retaining the regulatory option with respect to rear-center seats. See 54 Fed. Reg. 25275 (June 14, 1989).

The regulatory preamble once again emphasized that "NHTSA believes that lap/shoulder belts would be more effective than lap-only belts in rear seating positions." *Id.*

In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars. (RFJN, Ex. 4, Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions.) Among other things, the study compared the fatality risk for lap/shoulder belted occupants to the risk for lap-belted occupants. NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts [in rear outboard seats] *has significantly enhanced occupant protection, especially in frontal crashes.*" (RFJN, Ex. 4, at 1.) NHTSA added that:

> In all crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone . . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent.

(RFJN, Ex. 4, at 1.)

In December 2002, President Bush signed into law a bill known as "Anton's Law," which provides for the improvement of child safety devices when installed in motor vehicles. See Pub. Law No. 107-318.

One of the provisions of Anton's Law concerns the installation of lap/shoulder belts in rear-center seating positions. Specifically, Section 5(a) of the law directs NHTSA to amend FMVSS 208 to require lap/shoulder belts in rear-center seats by no later than December 2004.

Compelled by this statutory directive, on August 2003, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (August 2, 2003). At the time, NHTSA stated that Anton's Law is "fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its notice of proposed rulemaking, NHTSA once again emphasized the special safety benefits of lap/shoulder belts for children, stating that "one of the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a lap/shoulder belt made available in rear center seating positions. When these lap/shoulder belts are installed in the rear center seating position, there will be an additional, and potentially safer, seating position available for a child in a belt-positioning booster seats." *Id.* at 46548. NHTSA further emphasized that requiring lap/shoulder belts in rear-center seats would not just benefit children: [i]t would also benefit older occupants." *Id.*

D. Geier v. American Honda

Relying on *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, MAZDA contends that all of PLAINTIFFS' claims arising out of the death of Thanh Williamson are preempted by federal law. *Geier,* however, is not applicable here.

Geier involved a "no airbag" claim. The plaintiff alleged that her injuries were exacerbated by the fact that her vehicle – a 1987 Honda Accord – lacked a driver's side airbag. *Id.* at 865. Plaintiff asserted that Honda had designed the car negligently and defectively by failing to equip the car with a driver's side airbag. *Id.*

Honda argued that this no airbag claim was preempted by the Safety Act, and in particular, FMVSS 208. Honda cited the portion of FMVSS 208 that required car manufacturers to "phase in" passive restraint requirements beginning in model year 1987. According to the court, there were two important prongs to this phase in requirement. First, the requirements allowed manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic seatbelts, etc. *Id.* at 878. Second, NHTSA implemented a gradual phase in of the passive restraints, requiring them on only 10 percent of 1987 models and increasing the percentage until it reached 100 percent for the 1990 model year. *Id.* at 879.

The court was also sensitive to some of NHTSA's concerns that led it to create the phase in scheme as opposed to requiring a specific type of system on all cars. Those concerns included the fact that since passive restraints were relatively new to the marketplace, it was not known how the public would react to the various systems, and NHTSA wanted to allow manufacturers time to experiment with a variety of systems in order to find the best ones. *Id.* at 877-79. Honda argued that the plaintiff's no airbag claim conflicted with this passive restraint phase in scheme and was therefore preempted by FMVSS 208.

First and most significantly, *the Supreme Court unanimously found that the Safety Act did not expressly preempt the plaintiff's claim. Id.* at 868. Honda had urged express preemption under the Safety Act's preemption provision. 15 U.S.C. § 1392(d). The Court, however, rejected this argument, relying on the Safety Act's "savings clause," which states: "Compliance with any [FMVSS] shall not exempt any person from any liability under common law." 15 U.S.C. § 1397(k); *Geier, supra,* 529 U.S. at 867-68. This language, the Court held, was specifically intended to "leav[e] adequate room for state tort law to operate – for example, where federal law creates only a floor, *i.e.*, a *minimum safety standard.*" *Id.* at 868 (emphasis added). Thus, under *Geier,* if a federal safety standard constitutes a floor or minimum standard, conflict preemption will ordinarily not apply because the Safety Act's savings clause "preserves those actions that seek to establish greater safety than the

minimum safety achieved by a federal regulation intended to provide a floor." 529 U.S. at 871.

This holding is critical because it made clear that the vast majority of automotive defect cases are not preempted because most FMVSS's create "only a floor, i.e., a minimum safety standard." *Id.* at 868. This holding is consistent with the Supreme Court's subsequent interpretation of other federal statutes with similar preemption provisions. See *Bates v. Dow Agrosciences LLC*, (2005) 544 U.S. 431 (plaintiffs claims against manufacturer of pesticide are not preempted by the labeling provision of Federal Insecticide, Fungicide, and Rodenticide Act because of its savings clause); *Sprietsma v. Mercury Marine*, (2002) 537 U.S. 51 (plaintiffs state common law claims against manufacturer of outboard motors were neither expressly nor impliedly preempted the [sic] Federal Boat Safety Act because the savings clause of the FBSA specifically preserved liability under state common law).

In spite of the savings clause, a five-member majority of the Supreme Court decided to apply implied preemption principles to the Safety Act and the FMVSS. *Geier, supra,* 529 U.S. at 874. The Court held that if a tort claim "actually conflicts" with the FMVSS, then it is preempted. *Id.* A claim actually conflicts when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 873. Applying these principles, the court found that the plaintiff's no

airbag claim actually conflicted with FMVSS 208. *Id.* at 874.

In short, the basis on which the Court found preemption was extremely narrow. Specifically, the Court found a conflict with FMVSS 208 based on the detailed NHTSA policy behind the passive restraint phase-in scheme. According to the Court, plaintiff's no airbag claim aimed at the 1987 Accord was the equivalent of requiring all 1987 model year vehicles to be equipped with an airbag. *Id.* at 881. The Court was concerned that such an "all airbag" rule in 1987 would have "presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* The Court had noted that NHTSA wanted this variety to "help develop data on comparative effectiveness" and to "facilitate the development of alternative, cheaper, and safer passive restraint systems." *Id.* at 862.

Thus, in all preemption motions relying on *Geier*, the focus must be on this narrow predicate of the court's ruling. The Court did not find that tort claims are preempted merely because there is a FMVSS covering the component at issue or providing options to manufacturers. The Court limited its holding to those cases where the claim would actually conflict with the stated purpose and goals of NHTSA.

E. The Government's Amicus Brief in *Geier*

In order to properly understand parameters of the Supreme Court's ruling, it is also important to

note that the court relied heavily on the position of the United States Government in its amicus brief. See Brief for the United States as Amicus Curiae Supporting Affirmance ("U.S. Brief"), 1999 WL 1045115. The Court found the government's positions persuasive because, according to the Court, they represent the Department of Transportation's interpretations of its own standards. *Geier, supra*, 529 U.S. at 883-84. In fact, a comparison of the amicus brief and the opinion shows that the court's rationale was adopted almost wholesale from the government's brief.

Like the court, the government took a very narrow stance on preemption by stating that automotive design defect cases are not preempted merely because they require more than the minimum federal standard. U.S. Brief, 1999 WL 1045115, at *21. Significantly, the government took the position that *such claims are not preempted merely because the standard provides multiple options from which a manufacturer can chose* [sic] *in designing its cars. Id.* at *21-22.

F. California and the Ninth Circuit

There are currently no published California State or Ninth Circuit cases applying *Geier* to an automotive defect case. However, the Ninth Circuit and district courts have distinguished *Geier* in other contexts.

Shortly after *Geier* was decided, the Ninth Circuit applied it in a non-auto context. In *Leipart v.*

Guardian Industries (9th Cir. 2000) 234 F.3d 1063, the plaintiff alleged he was injured due to defects in a shower door that caused it to break into long, dangerous shards rather than into small, relatively harmless pieces. *Id.* at 1065-66. The defendant argued such claims were preempted by the federal Consumer Product Safety Act ("CPSA"). Like the auto Safety Act, the CPSA calls for the promulgation of standards similar to the FMVSS, and one of those standards specifically addresses the manner in which shower doors must break if subjected to a certain force. *Id.* at 1066. The CPSA also contains an express preemption clause and savings clause almost identical to the auto Safety Act. *Id.* at 1066-67.

Like *Geier*, the *Leipart* court first held that the CPSA did not expressly preempt the plaintiff's claims. *Id.* at 1069. The court then went on to distinguish *Geier* and hold that the CPSA also did not impliedly preempt the claims. *Id.* at 1069-70. In doing so, the court cited to the fact that *Geier* relied upon NHTSA's stated policies behind the phase-in provisions of FMVSS 208. *Id.* at 1069. The CPSA is different because it merely created a "floor" or minimum standard above which state law could impose further duties. *Id.* at 1070.

Similarly, in *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 672 (9th Cir., 2003), the Ninth Circuit distinguished *Geier* in the context of a case implicating the Clean Air Act:

"Geier is distinguishable from this case on two grounds. First, in Geier, the relevant regulating agency, in interpreting its own governing statute, had decided that the suit was preempted, and the Supreme Court gave deference to the agency's determination. See id. at 883-84. Here the EPA has made no such determination. Second, the Supreme Court in Geier found abundant evidence in the administrative history of the FMVSS to indicate that it was intended to give auto manufacturers a choice of safety restraints. See id. at 875-83. We can find no evidence that the Clean Air Act was intended to give gasoline producers a comparable choice of oxygenates. Indeed, we have already specifically held in Exxon Mobil that HN16the [sic] legislative history of the Clean Air Act does not support a conclusion that Congress meant to give gasoline producers an unconstrained choice of oxygenates. For these reasons, several courts have already rejected Geier-based preemption challenges to MTBE regulations."

The Northern District of California has also properly applied a narrow reading of *Geier* in two decisions denying motions to dismiss automobile class actions. See *Kent v. DaimlerChrysler Corp.* (N.D. Cal. 2002) 200 F.Supp.2d 1208, 1210; *Chamberlain v. Ford Motor Company*, (N.D. Cal. 2004) 314 F.Supp.2d 953.

In *Kent*, the plaintiffs brought a class action alleging that certain model year Jeep Grand Cherokees

have a design defect, which causes them to self-shift from park to reverse. *Kent, supra*, 200 F.Supp. at 1210. DaimlerChrysler argued that plaintiffs' claims were preempted by FMVSS 102, which addresses transmission issues. The court, citing *Geier*, rejected that argument. It noted the *Geier* court's reliance on the history of FMVSS 208 and NHTSA's stated desire to encourage a mix of passive restraint systems. *Kent, supra*, 200 F.Supp. at 1215. By contrast, the court found no such policy rationale in FMVSS 102. *Id.* at 1216.

Likewise, in *Chamberlain*, the court engaged in a proper interpretation of *Geier* and denied Ford's motion to dismiss a class action complaint. The court found that *Geier's* preemption holding was based on the history of FMVSS 208 and that "the Department of Transportation's carefully considered policy decision to allow gradual introduction of safety devices better to meet safety needs and accommodate manufacturers and the public." *Chamberlain, supra*, 314 F. Supp. 2d at 963. Like *Kent*, the court found no such "considered choice" at issue in that case. *Id.* ("*Geier* is distinguishable because there is no substantive regulation at issue in the instant case nor is there language in the MVSA or its legislative history demonstrating that exclusive federal agency administration of injunctive remedies in the field of motor vehicle safety was the considered policy choice of Congress.")

These decisions demonstrate that that [*sic*] the Ninth Circuit and California acknowledge the limited

scope of *Geier*. These courts recognize that the FMVSS do not preempt state tort claims that simply hold the manufacturers to higher standards than the bare minimum required by the FMVSS.

G. PLAINTIFFS' claims regarding the lack of a three-point seat belt are not impliedly preempted by FMVSS 208.

PLAINTIFFS' seat belt claims are not preempted here simply because PLAINTIFFS seek to hold MAZDA to a higher standard than the minimum standard set forth in FMVSS 208. See *Leipart, supra,* 234 F.3d at 1070. Examples of FMVSS that establish minimum performance standards are those dealing with roof crush (FMVSS 216) and seat back strength (FMVSS 207). Some published cases provide additional examples.

In *Harris v. Great Dane Trailers* (8th Cir. 2000) 234 F.3d 398, the plaintiff alleged inadequate reflective tape on the back of a truck. FMVSS 108 governs reflective devices on the back of trucks. The court found no preemption because FMVSS 108 only set a minimum standard. *Id.* at 401-02. The court also found that the lack of specific tape configuration requirements did not preempt the claim because it did not constitute a federally granted "option" like the standard at issue in *Geier*. Rather, it simply "left the industry where it was before – free to make voluntary decisions" about safety devices. *Id.* at 402-03.

The mere existence of options in FMVSS 208 does not mean that a claim based on the choice of one of those options is preempted. The government took this position in its amicus brief for *Geier* by stating that even though FMVSS 125 gave manufacturers multiple options for the design of reflective devices on stopped vehicles, NHTSA did not determine that the availability of these options was necessary to promote safety. U.S. Brief, 1999 WL 1045115, at *21-22. In other words, the "options" at issue in that case were part of a unique phase-in scheme that sought a mix of systems. Absent such a specific regulatory history promoting the mix of options, preemption cannot apply.

This is the lesson of *Geier* itself (which relied on a highly unusual regulatory history as the basis for its preemption holding, *not* on the fact that the regulation created various options) and of the United States' own consistent litigating position that mere regulatory options do not, in and of themselves, exert any preemptive effect. If the mere existence of regulatory options were sufficient to preempt tort claims, then *Geier* would not have even needed to address the complex policy reasons underlying the 1984 version of FMVSS 208; it would have been sufficient to point out that the car maker in that case (Honda) had chosen to install one of several permitted regulatory options, and that the chosen option did not require an airbag. *Geier*, however, never purported to rely on such an observation, making clear that regulatory options,

standing alone, do not exert any preemption force under the Safety Act.

Contrary to MAZDA's assertion, there is no basis for concluding that this lawsuit would undermine some special federal policy with respect to rear-center seats. This case is inapposite from *Geier,* which involved a version of FMVSS 208 that required car manufacturers to install either airbags or some other form of passive restraint in the front seats of passenger cars. The accompanying regulatory preamble made clear that the reason the federal government gave car makers the choice of installing various types of passive restraints was to ensure that car manufacturers installed a mix of different devices in the front seats of cars, in part to avoid a massive public backlash against airbags. Given this fear of airbags, NHTSA had the specific goal of ensuring that some cars include forms of passive restrains [sic] *other than* airbags. *Geier* held that, in light of this unique goal, a jury verdict holding a manufacturer liable for its failure to install an airbag would undermine federal policy by pushing car makers to install airbags in all their cars.

This federal policy has no application here. In contrast to the hotly-debated airbag, the lap/shoulder belt has always been required equipment in the front seats of passenger cars (and since 1989, in the rear outboard seats). Given this history, there is no basis for concluding that NHTSA affirmatively sought to induce manufacturers to build some number of cars that did not include lap/shoulder harnesses in the

rear-center seats. And the regulatory history of the options standard at issue does not contain a *single reference* to the type of "technological diversity" goals at issue in *Geier*.

Nor is there any merit to MAZDA's contention that the federal government's 1989 decision to not require lap/shoulder belts in rear-center seats would be undermined by this lawsuit. This decision was not based on any conclusion that lap/shoulder belts would be unsafe or undesirable in that seating position. To the contrary, NHTSA repeatedly stated that lap/shoulder belts were the safest form of seat belt technology, and it affirmatively *required* lap/shoulder belts in all other seating positions. Instead, the agency's decision to not require lap/shoulder belts in rear-center seats was based on its concerns about the technical difficulties of requiring lap/shoulder belts in all cars and the economic burden such a universal rule would impose on car makers. The U.S. Supreme Court, however, has made it clear that *these sorts of concerns cannot form the basis for a finding of implied preemption*. See *Sprietsma, supra*, 537 U.S. 51.

H. The out-of-state federal cases relied upon by MAZDA have no precedential or persuasive authority here.

In addition to its erroneous reliance on *Geier*, MAZDA cites on a number of cases that do not support its position. MAZDA principally relies on *Griffith v. General Motors Corp.*, 303 F.3d 1276 (11th Cir.

2002), which found implied conflict preemption of the plaintiff's claim that General Motors was negligent for failing to provide a shoulder belt along with a lap belt in the front-center seat of a car. *Griffith*, however, is flawed at its core and should not be given any consideration by this Court.

First and foremost, *Griffith* was decided before the U.S. Supreme Court decided *Sprietsma*, 537 U.S. at 51. As explained above, *Sprietsma* makes clear that an agency's decision not to require a particular safety feature based on its view that the costs of a universal regulatory requirement might exceed the safety benefits does not preempt common-law claims seeking to hold a manufacturer liable for not installing that safety feature in a particular vehicle. In light of *Sprietsma*, the decision in *Griffith* is clearly wrong.

Second, *Sprietsma* aside, *Griffith* lacks any persuasive authority because it rests on an erroneous factual assumption that renders the entire decision invalid: that the federal government's "technological diversity" goal applied to *both* manual seat belts and passive restraints. In its decision, the Third Circuit asserted that "DOT intended and expected FMVSS 208 to produce a mix of restraint devices, *both passive and manual*, in cars and trucks." 303 F.3d at 1281 (emphasis added). As support for this proposition, *Griffith* relies exclusively on the U.S. Supreme Court's decision in *Geier*. *See id.* (citing *Geier*, 529 U.S. at 879). However, as explained above, *Geier* merely discussed the federal government's technological diversity goal with reference to *passive* restraints, and the

Supreme Court never suggested that NHTSA had similar goals with respect to manual restraints in the rear seats of vehicles. This is not surprising, given that MAZDA itself has failed to unearth any regulatory materials that even hint – let alone demonstrate – that NHTSA ever intended to promote a diverse array of manual restraints in the rear-center seats of passenger cars. This core factual error strips *Griffith* of any even arguable validity.

Third, *Griffith* is distinguishable on its facts. *Griffith* involved claims that a pickup truck was defectively designed because its *front* center seat lacked a lap/shoulder belt. 303 F.3d at 1278. This is an entirely different issue than this case, which involves the *rear* center seat of a passenger car. The 1989 rulemaking that is the centerpiece of MAZDA's preemption argument here was not at issue in *Griffith*, because that rulemaking did not address the front seats of cars. Thus *Griffith* involved a different type of claim; a different options standard; and an entirely different regulatory history than this lawsuit – all reason enough to reject any reliance on the decision outright.

Hurley v. Motor Coach Inds., 222 F.3d 377 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001) is also inapposite. There, a bus driver sued a bus manufacturer for failing to do more than install a two-point lap belt in his seat, which was the minimum safety feature required by federal law. (The governing version of FVMSS 208 gave the manufacturer the option of installing either a full "passive" system or

installing *either* a lap belt or a lap/shoulder belt.) With respect to the claim that the seat should have had a lap/shoulder belt, the Seventh Circuit focused on the fact that NHTSA had expressed concern that *heavy vehicle operators* – *e.g.*, bus drivers – have a particularly "strong aversion" to using seatbelts of any kind. *See id.* at 382. Based on this evidence of seatbelt "aversion" among heavy vehicle operators, *Hurley* concluded that NHTSA's decision to permit installation of the less-restrictive two-point lap belt (as opposed to the more confining three-point lap/shoulder belt) was specifically designed to "promot[e] safety by encouraging drivers to use the safety equipment that manufacturers install." *Id. Hurley* ultimately held that, "as in *Geier,* the decision to leave options open to bus manufacturers *was made with specific policy objectives in mind.* Hurley's suit, if successful, would undermine that policy objective and is therefore preempted." *Id.* (emphasis added).

No such "specific policy objectives" could possibly be implicated by this lawsuit. *Hurley*'s reasoning would only apply here if NHTSA's decision to give *car makers* the choice of installing lap belts instead of lap/shoulder belts in rear seats was based on a desire to avoid aggravating the public's "aversion" to seatbelts. But the history of FMVSS 208 as it applies to *cars* – and not buses – itself disproves any such conclusion. As previously explained, Standard 208 has *always* required three-point lap/shoulder belts in the front driver's and passenger seats of cars. It is therefore apparent that, in NHTSA's view, a three-point

system has always been the safest form of manual restraint in *cars*, where the risk of driver "aversion" to seatbelts has not been an issue. Given that there was no evidence of driver "aversion" to seatbelts that influenced NHTSA's rulemaking with respect to the front seats of cars, it would make no sense to assume that any such concern animated the agency's decision to create a regulatory option with respect to the rear seats of cars. Instead, the rear-seat option can best be understood as reflecting the agency's view (as set forth in the regulatory preamble) that, because rear seats are generally safer and less frequently occupied than front seats, there was no reason to mandate three-point lap/shoulder belts for all rear-center seats.21 [sic] Thus, none of the policy objectives at issue in *Hurley* has any application to this lawsuit.

MAZDA also cites two cases – *Carasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169 (M.D. Pa. 2001), and *Hernandez-Gomez v. Volkswagen of American* [sic], *Inc.*, 32 P.3d 424 (Ariz. App. Div. 2001) – that have no bearing here because, like *Geier*, they involved claims that a car maker was negligent for choosing one of the particular forms of *passive* restraints permitted by FMVSS 208.[1] As in *Geier*, these

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[1] In *Carasquilla*, the car at issue was equipped with one of the passive-restraint options that was specifically permitted by the version of Standard 208 at issue in *Geier*: an automatic lap/shoulder harness and a manual lap belt. The plaintiff contended that this system was defectively designed because, *inter alia*, it should have included an "integrated automatic lap belt." *Id.* at 174. Relying on *Geier*, the Court held that the claim was

(Continued on following page)

claims arguably would have interfered with the federal government's goal of encouraging a mixture of different *passive* restraint technologies in passenger cars. This concern is not present in cases, like this one, that involve the installation of *manual* restraints in the rear seats of passenger cars, which were specifically exempted from the passive-restraint requirements at issue in *Geier*.[2]

In sum, there is no basis for this Court to find implied conflict preemption of plaintiffs' no-lap/shoulder-belt claim. The core teaching of *Geier* is that conflict preemption only exists where the common-law claims would directly undermine federal purposes. Try as it might, MAZDA has failed to identify

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preempted because it "was a direct challenge to the passive restraint system available to . . . defendants under Standard 208" and thus "is no different from petitioners' claim in *Geier*." *Id.* at 176.

Similarly, in *Hernandez-Gomez*, the car at issue was equipped with a passive restraint option that was specifically permitted by Standard 208: a automatic shoulder belt that did not include a manual lap belt. The plaintiff contended that the system was defectively designed because it did not have a lap belt. The Arizona Court of Appeals disagreed, holding that, under *Geier*, the plaintiff's claims would interfere with the federal government's goal of giving car manufacturers a choice of *passive* restraint options.

[2] MAZDA's reliance on *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) is misplaced for the same reason because it involved claims that a car maker was negligent for choosing one of the *passive* restraint options permitted by FMVSS 208 (an automatic shoulder harness and an automatic lap belt).

even a single federal purpose that would be undermined or frustrated by a jury verdict holding it liable in this case. Especially in light of the strong presumption against preemption, MAZDA's preemption defense must fail.

V. PLAINTIFFS' FAILURE TO WARN CLAIM REGARDING THE SEAT BELT IS AN INDEPENDENT LEGAL THEORY THAT CANNOT BE PREEMPTED.

It is MAZDA's burden to demonstrate preemption. *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956-957. MAZDA must establish plaintiff's failure to warn claim (SAC ¶ 21, 22, 40, 47.) was premised on a preempted design defect theory. As demonstrated above, MAZDA has failed to carry that burden.

Under California law, a failure to warn claim is an independent legal theory that does not require any showing of design defect. See *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1110-1113. "Even though the product is flawlessly designed and manufactured, it may be found defective within the general strict liability rule and its manufacturer or supplier held strictly liable because of the failure to provide an adequate warning." *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 174. The jury "'must decide whether a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes "defective" simply by the absence of warning.'" *Finn*

v. G.D. Searle & Co. (1984) 35 Cal.3d 691, 699, quoting *Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 347.

Here, PLAINTIFFS' failure to warn claims are not premised on MAZDA's failure to use lap/shoulder belts for the rear center seat. To the contrary, PLAINTIFFS allege MAZDA failed to warn them about the dangers of using a lap-only belt, about the dangers of the defective rear seat back, and about the dangers inherent in the angle and geometry of the seat bottom. (RFJN, Exs. 1 and 2.)

VI. IF THE COURT SHOULD GRANT THIS MOTION, IT MUST GIVE PLAINTIFFS LEAVE TO AMEND.

If the court concludes that the complaint does not state a claim, but there is a reasonable possibility that the defects can be cured by amendment, leave to amend must be granted. *Stevens v. Superior Court* (1999) 75 Cal. App. 4th 594, 601. In fact, "liberality in permitting amendment is the rule." *Angie M v. Sup. Ct.* (1995), 37 Cal.App.4th 1217, 1227. Courts are very liberal in permitting amendments, not only where a complaint is defective in form, but also where substantive defects are apparent. *Von Batsch v. American Dist. Telegraph* (1985) 175 Cal.App.3d 1111, 1119. A denial of leave to amend constitutes an abuse of discretion. *Goodman v. Kennedy* (1976), 18 Cal.3d 335, 349; *Okun v. Maple Properties* (1981), 29 Cal.3d 442, 460.

"[T]here is a strong policy in favor of liberal allowance of amendments." *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945. Moreover, "[i]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment." *Id.* (citation omitted). Similarly, it is "irrelevant that new legal theories are introduced as long as the proposed amendments 'relate to the same general set of facts.'" *Id.* (citing, *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048).

Here, PLAINTIFFS' subsequently discovered that the angle and geometry of the seat bottom and integrity of the seat back of the rear seat in which Thanh and Alexa Williamson were seated during the accident were also defective and contributed to their injuries. PLAINTIFFS put defendants on notice of these defects in discovery responses served on June 17, 2005. (RFJN, Ex. 2, at 4.) Therefore, if the Court grants this motion, PLAINTIFFS must be given leave to amend the complaint to add allegations concerning these defects because they are concurrent causes of Thanh Williamson's injuries and death and arise from the same general set of facts set forth in the Second Amended Complaint.

VII. CONCLUSION

For the foregoing reasons, Defendant MAZDA's motion for judgment on the pleadings must be denied in its entirety.

DATED: June 22, 2006

GIRARDI | KEESE

By: /s/ David Lira
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[Proof Of Service Omitted In Printing]

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC	**CASE NO. 04CC06494** **Assigned:** **Hon. Michael Brenner** **Department: C20** **DEFENDANT MAZDA MOTOR COPORATION'S REPLY TO PLAINTIFFS' OPPOSITION TO MAZDA'S MOTION FOR JUDGMENT ON THE PLEADINGS** **[CCP 438 and common law]**

EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**VIA FAX** **Date: July 6, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

Defendant Mazda Motor Corporation ("MC") hereby files its Memorandum of Points and Authorities in reply to Plaintiffs' Opposition to Mazda Motor Corporation's Motion for Judgment on the Pleadings as follows:

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY

I. INTRODUCTION: AS EVEN PLAINTIFFS ACKNOWLEDGE, FOR 36 YEARS, NHTSA MADE AND MAINTAINED ITS CONSIDERED DECISION TO GIVE MANUFACTURERS A CHOICE OF RESTRAINTS IN REAR CENTER SEATS

Notwithstanding all the procedural infirmities of Plaintiffs' late served, oversized, inaccurate reply brief, and the inappropriate matters of which Plaintiffs half-heartedly seek judicial notice, one thing remains clear and uncontroverted even by Plaintiffs:

For 25 years before this 1993 Mazda MPV was manufactured, and for 11 years after it, NHTSA, the agency Congressionally charged with promulgating motor vehicle safety standards, considered and found that in furtherance of its policy goals, it should offer manufacturers a choice of whether to use a lap belt (a "two-point" or a "Type 1") or a lap/shoulder-belt ("three-point" or "Type 2") in the rear center seat of vehicles such as this van.

Plaintiffs erroneously suggest that no policy reasons for NHTSA's decision exist. Those policy reasons are explicated in the NHTSA history and noted at page 10 of MC's Motion and concern the "technical difficulties associated with anchoring the shoulder portion of the belt at the center seating position." See Request for Judicial Notice accompanying Motion, Exhibit "B."

Now, Plaintiffs want a California court to overrule NHTSA's policy decisions, and impose tort and even punitive damages, for MC exercising the choice that Congress, through NHTSA, gave it. Little could be more obstructive to NHTSA's policy decisions (to provide an option) than to impose tort, compensatory and punitive damages against an entity that follows one option instead of the other.

Plaintiffs cite a number of Ninth Circuit and district court cases to distinguish *Geier v. American Honda Motor Company, Inc.*, yet each case declined to follow *Geier* only because, in those cases, the

allegedly preempted regulation did not provide options.

Here, just as in *Geier,* NHTSA provided options that would result in a mix of selections. This Court cannot, and should not, permit a claim based mainly on MC's selection of a lap belt instead of a lap/shoulder belt. From the Second Amended Complaint, there can be little doubt that the lap belt vs. lap/shoulder belt decision is at the heart of Plaintiffs' claims about the injuries suffered by Thanh Williamson while riding in the rear center seat. As such, MC's judgment on the pleadings with respect to those injuries should be granted.

II. PLAINTIFFS' OPPOSITION AND REQUEST FOR JUDICIAL NOTICE ARE PROCEDURALLY IMPROPER AND SHOULD BE STRICKEN

Plaintiffs' Opposition not only relies upon misinterpretation of precedent and instructive authority, but it also is procedurally defective in several regards. First, Plaintiffs obviously recognize the importance of this motion, as they filed an excessively long brief and attempted to assert items that are not judicially noticeable. California Rules of Court rule 313 provides for a procedure by which Plaintiffs could have sought this Court's permission, yet they ignored it.

C.C.P. section 1005, subdivision (c) required that the Opposition be served in a manner "reasonably

calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, as filed." Plaintiffs ignored that rule as well, simply mailing the Opposition, which was not received until 4 days later – essentially a day and a half before this Reply was due.

Further, obviously recognizing the problems with the content of their Second Amended Complaint, Plaintiffs improperly referenced interrogatory responses to support their opposition. Under section 438(d), only matters in a pleading, or of which the Court may take judicial notice, are properly before the Court; interrogatory responses are neither a pleading nor judicially noticeable. Notably, Plaintiffs offer no explanation as to why a year has passed and the Complaint has not been amended, or even how they would amend the Complaint to avoid the preemption issue.

Further, three of the four items for which the Plaintiffs seek judicial notice are not judicially noticeable. (See Defendant Mazda Motor Corporation's Objections concurrently filed.) In addition to interrogatories being excluded from consideration, the NTSB letter, discussed at length in the Opposition, has no bearing on NHTSA's action and cannot be considered. It is most telling that Plaintiffs make no effort to tie the NTSB safety recommendations to any NHTSA action. And the NTSB document itself notes that it refers to a study which "is limited," and notes that "the small size of the sample in this study

means that no statistically valid conclusions can be drawn from it." Plaintiffs' Exh. 3, p. 2. Finally, the NHTSA report (Exhibit 4) is not something of which the Court can take judicial notice. Plaintiffs have not explained how a June 1999 report could impact a vehicle that was manufactured in 1992 or 1993.

III. PLAINTIFFS' PREEMPTED CLAIM IS THE HEART OF THEIR CAUSES OF ACTION ARISING FROM THANH WILLIAMSON'S INJURIES

As is clear from paragraph 2 of Plaintiffs' Second Amended Complaint, the claims arising from the injuries to and wrongful death of Thanh Williamson are founded on a claim that she "jackknifed" around her seat belt. (They allege she "was killed when the forces generated by this collision caused her body to 'jackknife' around her defective lap belt, causing severe abdominal injuries and internal bleeding.") Plaintiffs' interrogatory responses, identifying facts to support their contention that the injuries would not have been severe but for certain claimed wrongful conduct, confirm the essential nature of this claim:

> "[a] lap-shoulder belt would have prevented PLAINTIFFS ALEXA WILLIAMSON and THANH WILLIAMSON from 'jackknifing' over the lap belt and thus prevented severe abdominal injuries."

The other claims, concerning a better designed seat belt and a seat back, are based on the

lap/shoulder belt claim, since Plaintiffs do not allege they caused the injury, but rather that they further exacerbated the injury caused by the jackknifing.

The Court thus can properly grant judgment on the pleadings to the preempted claims. Moreover, in cases like this, it can grant judgment on less than the entire claim. As is obvious from the parties' trial estimates and the numerous theories asserted, this is a complex claim. In complex matters, a "trial court has broad discretion . . . to fashion suitable methods of practice in order to manage complex litigation." *Fire Ins. Exch. v. Superior Court* (2004) 116 Cal.App.4th, 446, 452 (citing *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967. The Fire Ins. Exch. court found that granting a motion for judgment on the pleadings for less than an entire cause of action was permissible. Whether the preempted claims are the essence of Plaintiffs' causes of action, or merely part of a complex claim, the Court should grant judgment on them.

IV. PLAINTIFFS MISUNDERSTAND AND MISREPRESENT THE HOLDING AND SCOPE OF *GEIER V. AMERICAN HONDA* AND CASES INTERPRETING IT

Not surprisingly, Plaintiffs' first inaccurate representation of the *Geier* decision appears on the first page of their Opposition. There, Plaintiffs remarkably assert that their "claims arising out of the lack of a lap/shoulder belt in the rear center seat are

expressly and unequivocally exempted from federal preemption by the 'savings' clause of the Federal Motor Vehicle Safety Act." Opp. at 1:19-21. Of course, even Plaintiffs were later forced to admit that was not the holding of *Geier,* and that *Geier* specifically found implied preemption prohibited Geier's case against American Honda. *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861. *See* Opp. at 8, citing *Geier, supra,* 529 U.S. at 874. Indeed, conflict preemption is all that this Motion is focused upon – the Plaintiffs' attempt to have this Court impose tort liability for the manufacturer's selection of one, and not the other, of the rear center safety belt options provided by NHTSA.

Throughout the Opposition, Plaintiffs assert that Geier should be narrowly interpreted and applied sparingly. This is ironic given the number of times that Geier has been cited for guidance, whether or not a court finds that preemption is warranted.

> *Geier is* not a narrow holding limited to automobile safety standards; instead it established a general rule upholding conflict preemption even if the applicable federal law contains a savings clause.

Dowhal v. Smithkline Beecham Consumer Healthcare (2004) 32 Cal.4th 910, 926 (citing *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 63.) It is no small irony that the *Dowhal* court relied on *Sprietsma* – a case which Plaintiffs cited for the exact opposite proposition.

Plaintiffs attempt to limit *Geier* by referencing inapposite Ninth Circuit and District Court opinions. First, Plaintiffs cite *Leipart v. Guardian Industries* (9th Cir. 2000) 234 F.3d 1063 which concerned glass breakage safety standards for shower doors – a "non-auto context." What is critical about *Leipart* was that the plaintiff's claims there were *not* based upon an assertion that the shower door manufacturer chose one type of glass when it should have chosen another. No "wrong choice" claim was made.

This issue – whether a plaintiffs claims are based on the defendant's selection of regulation- provided options – was central also in the *Oxygenated Fuels Ass'n v. Davis* (9th Cir. 2003) 331 F.3d 665, 672 decision that Plaintiffs cite. As quoted by Plaintiffs, the *Oxygenated Fuels* court distinguished its facts from *Geier*.

> "Second, the Supreme Court in *Geier* found abundant evidence in the administrative history of the FMVSS to indicate that it was intended to give auto manufacturers a choice of safety restraints. *See id.* at 875-83. We can find no evidence that the Clean Air Act was intended to give gasoline producers a comparable choice of oxygenates."

See Plaintiffs' Opposition at 10.

Thus, even the Plaintiffs' own authority shows two critical points. First, *Geier* is applicable outside the air bag/no air bag context. Second, the critical factor for whether *Geier* preemption applies is whether

there was an intention by the regulation to provide options to the defendant. It is clear that FMVSS 208 gave MC the option of installing a lap/shoulder-belt, or lap belt, in the rear center seat.

Similarly, *Kent v. DaimlerChrysler Corp.* (N.D. Cal. 2002) 200 F.Supp. 2d 1208, 1210 and *Chamberlan v. Ford Motor Company* (N.D. Cal. 2004) 314 F.Supp. 2d 953 prove, rather than disprove, the viability of *Geier* and its applicability to this matter. In *Kent,* the court succinctly indicated why *Geier* was inapplicable:

> Defendant has pointed to nothing, either in the regulation or in the history of the regulation, suggesting that Plaintiffs' lawsuit frustrates the purpose of FMVSS 102. In contrast to the standard at issue in *Geier,* FMVSS 102 does not give manufactures [*sic*] a choice with respect to transmission design.

Kent, supra, 200 F.Supp. 2d at 1215. The *Kent* court could not have made it any clearer that it viewed *Geier* as turning on whether a manufacturer exercised a NHTSA-provided choice.

Chamberlan involved a class action concerning allegedly defective intake manifolds, and whether injunctive relief under the California Unfair Competition Law was preempted by federal law. As Plaintiffs here admit, the *Kent* court found that there was no substantive regulation at issue in its case. *Id.* at 11 (citing *Chamberlan, supra,* 314 F.Supp. 2d at 963). The *Kent* court's discussion of *Geier* immediately

preceding the portion quoted in Plaintiffs' opposition is even more instructive:

> As the result of a considered policy choice, under FMVSS 208, manufacturers had no duty to install air bags at the time they manufactured the plaintiffs' car, yet the *Geier* plaintiffs' tort claims relied upon precisely such a duty. [Citing *Geier* at 529 U.S. at 881.] The Court held that allowing a State law tort claim to proceed under these circumstances would in effect impose a safety standard upon manufacturers different than that imposed by the Department of Transportation's well-considered regulation.

Chamberlan, supra, 314 F.Supp. 2d at 963 (citing *Geier, supra,* 529 U.S. at 881.)

If one were to substitute the air bag discussion for one concerning shoulder/lap belts, the *Kent* court's description of *Geier* is equally applicable here. NHTSA made a considered policy choice under FMVSS 208, so manufacturers like MC had no duty to select a lap/shoulder belt over a lap belt; NHTSA said it could choose *either* one. Allowing the Plaintiffs here to have a state law claim based upon the choice of one safety belt system over another would impose "a safety standard upon manufacturers different than that imposed by the Department of Transportation's well-considered regulation."

V. NHTSA'S PURPOSES WOULD BE FRUSTRATED BY BANNING ALL TYPE 1 BELTS

Despite the length of their Opposition, Plaintiffs ignore NHTSA's history of specifically allowing a combination of Type 1 and Type 2 belts in vehicles to ensure occupant safety with adults, adolescents and young children. This is particularly surprising since NHTSA's purposes are set out in the NHTSA very regulations which Plaintiffs cite in their Opposition.

NHTSA's decision to provide a Type 1 option was deliberate. In fact, in the late 1980's, when it mandated lap/shoulder belts for rear *outboard* seating positions, NHTSA decided *not* to require lap/shoulder belts in rear non-outboard seating positions. See 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); 53 Fed. Reg. 47982, 47984-47985 (Nov. 29, 1988). In deciding to maintain the existing option for either lap belts or lap/shoulder belts in rear non-outboard positions, NHTSA focused on a number of important policy concerns.

First, NHTSA concluded that technical and cost issues weighed decisively against a lap/shoulder belt requirement for rear non-outboard seating positions. NHTSA noted that a number of commenters had objected to the structural changes that would be needed for lap/shoulder belts in rear non-outboard seating positions. *See* 53 Fed. Reg. at 47984. Others pointed out the high costs and small anticipated benefits that rear center lap/shoulder belts would provide. *Id.*

The American Seat Belt Council had pointed out, *inter alia,* that lap/shoulder belts in rear center seating positions had "little field testing." *Id.* Other commenters noted that there would be difficulties in locating the anchorage for a rear center lap/shoulder belt in a variety of vehicles. The anchorages in hatchbacks or station wagons would have to be located either in the loadspace floor (disrupting the cargo carrying area) or on the vehicle roof (which would impede the driver's rearward vision). *Id.*

In the preamble to the November 1989 final rule on lap/shoulder belts in rear seating positions, NHTSA reiterated its conclusion that the lap/shoulder belt requirement should apply only to rear outboard seating positions, noting that:

> [s]ome commenters suggested that technologies and designs are available to provide lap/shoulder belts at rear center seating positions, and that NHTSA should further examine this issue. The agency explained in the NPRM that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task. Accordingly, this rulemaking excluded further consideration of a requirement for center rear seating positions. None of the commenters presented any new data

> that would cause the agency to change its tentative conclusion on this subject that was announced in the NPRM.

54 Fed. Reg. at 46258.

NHTSA had also been concerned about the compatibility between child safety restraints and a requirement that lap/shoulder belts be provided at all rear designated positions. As noted above, the consistency between restraint requirements and child safety has been a recurring them [sic] in FMVSS 208 rulemakings. Thus, in denying the 1984 petition to require lap/shoulder belts at outboard rear seating positions, NHTSA not only disagreed with petitioners' premise that booster seats secured with lap/shoulder belts would be safer than would booster seats secured with tethers, but also stated that:

> [t]he installation of Type 2 belts in the rear outboard seating positions would make the installation of the conventional child safety seat much less convenient than with the current Type I belt. This would occur because the shoulder portion of a Type 2 belt would have to be placed behind the restraint, or otherwise moved out of the way, since most child restraints are designed to be used only with lap belts. This is an important consideration in view of the fact that 44 States and the District of Columbia have laws requiring the use of child safety seats. These State use laws make it desirable that

> compliance be accomplished as smoothly as possible.

49 Fed. Reg. at 15241-15242.

Against this background, the agency's decision not to require lap/shoulder belts in the rear center position, but rather to continue to give manufacturers the *option* of providing lap belts or lap/shoulder belts in rear non-outboard seats (including the rear center seat), makes eminent sense and clearly reflects a deliberate policy decision. The decision fosters flexibility, incorporates an appropriate assessment of the excessive costs that a lap/shoulder belt requirement would have imposed, reflects well-founded concerns – including safety concerns – about the technological problems that would be created by a lap/shoulder requirement for rear non-outboard seats, and demonstrates a prudent approach to the knotty and continuing dilemma posed by the seat belt/child restraint compatibility problem.

NHTSA has also recognized that lap belts should be allowed in seating positions which are adjacent to an aisle (like Mrs. Williamson in the subject MPV) to assist with ingress and egress for passengers going to the far rear seat.

> NHTSA has long recognized that belts installed at seating positions located adjacent to an aisle can impede ready access to or egress from seats located behind them. That

> is why we originally allowed lap belts at these seating positions.

69 Fed. Reg. No. 235, p. 70909.

Any argument by Plaintiffs that a ban on Type 1 belts would not frustrate NHTSA's purposes under FMVSS 208, as it was in effect for the 1993 Mazda MPV, is unrealistic. The history of the regulation and its slow phase-in of Type 2 belts over the years shows how NHTSA carefully balanced safety and feasibility of belt systems while being mindful of the various applications to which Type 1 and Type 2 belts were put.

VI. CONCLUSION

As set forth in MC's moving papers, Plaintiffs' claims that Mrs. Williamson was injured as a result of the MPV not having a Type 2 belt in the rear center seat are preempted under FMVSS 208. The cases cited by MC overwhelmingly establish that when an automotive manufacturer has the choice of several specified options under a NHTSA standard, the choice of one of the specified options cannot give rise to a defect claim. Further, MC has established that NHTSA had a legitimate purpose behind allowing the Type 1 belt and, therefore, Plaintiffs' claims are barred.

DATED: June 28, 2006

BOWMAN AND BROOKE LLP

BY: /s/ [Illegible]
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware corporation;	**CASE NO. 04CC06494** **Assigned:** **Hon. Michael Brenner** **Department: C20** **DEFENDANT MAZDA MOTOR CORPORATION'S OBJECTIONS TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE** [Filed concurrently with Reply to Opposition to Mazda Motor Corporation's Motion for Judgment on the Pleadings]

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**VIA FAX** **Date: July 6, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/7/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 07/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

Defendant Mazda Motor Corporation (hereinafter "MC") hereby objects to the purported "Plaintiff's [*sic*] Request for Judicial Notice" as follows:

MC objects to Plaintiffs' purported Request for Judicial Notice in that Plaintiffs seek the admission of items which are not subject to judicial notice and which are irrelevant to this matter.

Request for Judicial Notice	**Objections**
2. Estate of Than Williamson's Responses to Mazda Motor of America, Inc.'s Special Interrogatories;	2. Discovery responses are not appropriately relied upon in a motion or opposition to a motion for judgment on the pleadings. C.C.P. 438(d); Evidence Code Sections 451-453. Thus, it is irrelevant. (Ev. Code Section 350). These interrogatory responses are irrelevant,

	especially since they reflect matters not included in the Second Amended Complaint. To the extent that the Court admits these interrogatory responses, they may be looked at only as an admission by the Plaintiffs. For example, in response to Interrogatory No. 78, Plaintiffs note the heart of their Complaint: "A lap-shoulder belt would have prevented PLAINTIFFS ALEXA WILLIAMSON and THANH WILLIAMSON from 'jackknifing' over the lap belt and thus prevented severe abdominal injuries." The other complaints are supplemental to the lap-shoulder belt claim, in that Plaintiffs say that they "would have further reduced injury." Response to Interrogatory No. 78, p. 27.
3. National Transportation Safety Board's "Safety Recommendation to Foreign Manufacturers;"	3. This document is irrelevant. Evidence Code Section 350. The NTSB's letter/memorandum has nothing to do with the NHTSA options provided to manufacturers to select a lap-shoulder belt or a lap belt. Indeed, Plaintiffs simply

	throw it into their opposition, without tying it to any of NHTSA's actions. This letter from NHTSA is not judicially noticeable under Evidence Code Sections 451-453, and may not be considered by the Court. Moreover, the NTSB states itself, in the document, "this study is limited," and that "the small size of the sample in this study means that no statistically valid conclusions can be drawn from it." Exh. 3, p. 2.
4. NHTSA's Report entitled "Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions.	4. This document is irrelevant. Evidence Code Section 350. Further, this is not a document of which the Court can take judicial notice under Evidence Code Sections 451-453. The June 1999 report has no bearing on a vehicle manufactured in 1992 or 1993.

For all the foregoing reasons, Plaintiffs' Request for Judicial Notice of Items 2, 3, and 4 must be rejected as they are not matters of which the Court can take judicial notice. The only specific authority for judicial notice that Plaintiffs' cite, Evidence Code Section 452(d), refers to "Records of (1) any court of this state or (2) any court of record of the United

States or any state of the United States." Clearly interrogatory responses, an NTSB letter, and a NHTSA report are not records of the Court.

DATED: June 28, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
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[Proof Of Service And Service List
Omitted In Printing]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CENTRAL JUSTICE CENTER

DEPARTMENT C20

DELBERT WILLIAMSON, ET AL.,	)	
PLAINTIFFS,	)	
VS.	)	NO. 04CC06494
MAZDA MOTOR OF AMERICA, INC.,	)	
DEFENDANT.	)	

THE HONORABLE MICHAEL BRENNER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

THURSDAY, JULY 6, 2006

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS: GIRARDI & KEESE
ATTORNEYS AT LAW
BY: SHAHRAM A. SHAYESTEH

FOR DEFENDANT: BOWMAN AND BROOKE
ATTORNEYS AT LAW
BY: JULIAN G. SENIOR
AND BRIAN TAKAHASHI

KIMBERLY REX, RMR, CSR #6638
OFFICIAL COURT REPORTER

[2] **SANTA ANA, CALIFORNIA – THURSDAY, JULY 6, 2006 AFTERNOON SESSION**

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: ON WILLIAMSON VERSUS MAZDA MOTORS.

MR. SHAYESTEH: GOOD AFTERNOON, SHAHRAM SHAYESTEH FOR PLAINTIFFS.

MR. SENIOR: GOOD AFTERNOON AGAIN, YOUR HONOR. JULIAN G. SENIOR FOR DEFENDANTS MAZDA.

MR. TAKAHASHI: GOOD AFTERNOON, BRIAN TAKAHASHI WITH MR. SENIOR.

THE COURT: WELL, THIS IS A MOTION FOR JUDGMENT ON THE PLEADINGS. THE THEME OF IT, CORRECT ME IF I AM WRONG, IS THAT THIS PREEMPTION IN THAT I READ THIS ONE CASE, AND I HAVE TO TELL YOU THE FACTUAL PART OF IT IS INTERESTING. *GEIER*, G-E-I-E-R, 529 U.S. 861, 120, SUPREME COURT 1913. I THINK THAT IS A CITATION.

I STARTED TO SAY THE HISTORY OF SEAT BELTS AND ALL THAT IS INTERESTING. THE LEGAL ANALYSIS GETS TO BE PRETTY HARD GOING AFTER A WHILE.

BUT THE POINT IS, THAT, YOU KNOW, THERE IS THIS INVOLVED SCHEME THAT THE

FEDERAL DEPARTMENT OF TRANSPORTATION HAS INVOLVING THE PHASING IN OF PASSENGER RESTRAINTS. A STATE TORT CAUSE OF ACTION WOULD BE CONTRARY TO THAT SCHEME THAT YOU – WELL, IT WAS – WE ALL READ THAT [3] CASE.

THE POINT WAS THEY WERE PHASING VARIOUS ALTERNATIVES, AND ALL THAT. I GUESS THEY GOT BURNT WITH THE EMISSION LOCK AND PERHAPS THE – I REMEMBER MYSELF HAVING – MY WIFE HAD A MERCURY TOPAZ THAT HAD THAT SEAT BELT GOING UP THE DOOR WHEN YOU SHUT THE DOOR. WHAT A PAIN IN THE NECK THAT THING WAS.

APPARENTLY, AS I UNDERSTAND IT, SOME OF THOSE THINGS, THE WAY THEY HAD NO PUBLIC ACCEPTANCE. SO THERE WAS AN AVOIDANCE OF THEM.

SO THE DEPARTMENT OF TRANSPORTATION DEVELOPED A CALL IT A SCHEME, WHERE THEY WERE GOING TO PHASE IN VARIOUS ALTERNATIVES THAT WOULD ALLOW FOR SCIENTIFIC TESTING, YOU KNOW, COST SAVING AND GREATER ACCEPTANCE BY THE PUBLIC.

SO, IF – SO AS PART OF THAT AT THE TIME THIS MAZDA WAS MADE, THE ARGUMENT IS THAT THE FEDERAL STANDARD ALLOWED FOR THE LAP ONLY SEAT BELTS IN THE BACK SEAT. THEY HAD A STATE COURT TORT LAW IN

EFFECT DEMAND A HIGHER STANDARD. IT WOULDN'T BE SO HARMFUL OR CONTRARY TO THE FEDERAL SCHEME THAT IT WOULD BE PREEMPTED.

SO, THERE YOU HAVE IT, IS MY UNDERSTANDING. YOU'RE THE MOVING PARTY, COUNSEL.

MR. SENIOR: I THINK IN A NUTSHELL, YOUR HONOR, YOU GOT THE OUTLINE OF THE ARGUMENT. AS PLAINTIFF AGREES IN THIS VEHICLE, THE 1993 MAZDA MPV. FMVSS, FEDERAL MOTOR VEHICLE SAFETY STANDARD 208, IN THE REAR MIDDLE SEATS, [4] MIDDLE SEATS ONLY, REQUIRE MANUFACTURERS TO USE EITHER TYPE 1 SEAT BELT, WHICH IS THE LAP BELT ONLY THAT YOU DESCRIBED, OR TYPE 2 SEAT BELT, WHICH IS THE THREE-POINT OR LAP-AND-SHOULDER-BELT SEAT BELT SYSTEM.

THE SEAT THAT MRS. WILLIAMSON, DECEASED IN THIS CASE, WAS SITTING IN, WAS EXACTLY THAT, A REAR CENTER SEAT. AND IT WAS EQUIPPED WITH A TWO-POINT BELT SYSTEM ONLY.

SINCE APPROXIMATELY 1989, THREE-POINT BELT SYSTEMS HAVE BEEN REQUIRED IN THE OUTBOARD SEATING POSITIONS. BUT IN '89, WHEN THAT DECISION WAS MADE, AND THIS WAS SPECIFICALLY DECIDED THAT THEY WERE NOT GOING TO REQUIRE THREE-POINT SEAT

BELTS IN THESE REAR CENTER SEAT POSITION.

SO WHAT PLAINTIFFS HAVE ALLEGED IN THEIR SECOND AMENDED COMPLAINT, WAS THAT MRS. WILLIAMSON WAS INJURED BY VIRTUE OF USING THIS LAP-BELT-ONLY SYSTEM THAT WAS IN THIS REAR CENTER SEAT.

THE COURT: WELL, LET ME JUST INTERRUPT YOU FOR ONE SECOND.

TO THE EXTENT THAT THIS JUDGMENT ON THE PLEADINGS OUGHT TO BE VIEWED AS SOMEWHAT SIMILAR TO A DEMURRER, I THINK THEIR PLEADINGS ARE BROAD ENOUGH TO ALLEGE OTHER – THEY'RE BROADER THAN THAT.

I DON'T HAVE THE EXACT QUOTE HERE, BUT I THINK THEY WOULD ENCOMPASS THE IDEA THAT THERE WERE OTHER PROBLEMS WITH THE MAZDA, IS WHAT I AM TRYING TO SAY. IT'S [5] ABILITY TO SURVIVE CRASHES BEYOND THE SEAT BELT CAUSE OF ACTION.

YOU POINTED OUT THAT IT IS – THAT I COULD SEPARATE THAT OUT UNDER THE LAW, WE COULD GRANT THIS MOTION AS TO ONLY THE THEORY, I GUESS IT WOULD BE, THAT THE ACCIDENT IS CAUSED BY THE LAP-ONLY SEAT BELT, LEAVING THE OTHER CAUSE OF ACTION.

AND I NOTE THAT THE PLAINTIFF IS SUGGESTING THEY WOULD LIKE LEAVE TO AMEND

IF YOUR MOTION WAS GRANTED. I TAKE IT THAT WOULD BE JUST ELABORATE ON WHAT APPEARS TO BE THEIR OTHER THEORIES OF LIABILITY THAT IS IN DISPUTE.

YEAH, THAT IS WHAT PLAINTIFFS HAVE ASKED, THAT THEY BE GIVEN LEAVE TO AMEND.

NOW ALSO COMBINED WITH THE THIRD CAUSE OF ACTION IS COMPLETELY AND SIMPLY RELATED TO THE TWO-POINT BELTS, SO THE ENTIRE CAUSE OF ACTION WOULD GO OUT.

BUT YOU'RE ABSOLUTELY RIGHT. WHAT WE'RE ASKING HERE IS FOR YOU TO TAKE THOSE BELTS – THOSE TWO-POINT VERSUS THREE-POINT BELT CLAIMS OUT OF THE, CASE NOT THE OTHER CAUSES OF ACTION. BECAUSE THOSE CAUSES OF ACTION RELATE TO THE INJURIES THAT DEALT TO THE DRIVER AS WELL.

NOW, PLAINTIFFS HAVE INDICATED THEY – THAT THEY WOULD LIKE LEAVE TO AMEND. HERE WE ARE, I BELIEVE, TWO YEARS AFTER THE INITIAL COMPLAINT WAS FILED, ALMOST A YEAR AFTER THE SECOND AMENDED COMPLAINT WAS FILED. DISCOVERY IS CLOSED. WE HAVE A TRIAL DATE THAT YOUR HONOR [6] JUST MOVED YESTERDAY, ALREADY SET.

EVERY – I THINK ALMOST EVERY FACT WITNESS EXCEPT THREE OR FOUR HAS BEEN DEPOSED. AND HERE FOR THE FIRST TIME THEY'RE SEEKING LEAVE TO AMEND THE COMPLAINT ON THE EVE OF GETTING THIS CLAIM KICKED OUT.

SO WE THINK IT WOULD BE ERROR TO AMEND THE COMPLAINT AT THIS TIME.

BUT IF YOU WOULD LIKE ME TO GO ANY FURTHER ABOUT OUR ARGUMENT ABOUT THE PREEMPTION OF THE CLAIM, I CAN DO THAT AT THIS POINT.

THE COURT: LET'S HEAR FROM COUNSEL.

MR. SHAYESTEH: INITIALLY I WOULD JUST LIKE TO STATE FOR THE RECORD THAT THEIR MOTION IS PROCEDURALLY DEFECTIVE. THEY CAN'T SEVER OUT ONLY THE SEAT-BELT CLAIMS BECAUSE THEIR NOTICE DOESN'T ASK YOU TO DO THAT.

IT ASKS YOU TO DISMISS ALL CLAIMS ARISING OUT OF THE DEATH OF THE DECEDENT, AND AS YOU POINTED OUT, YOU CAN'T DO THAT BECAUSE THEY DON'T ADDRESS EVERY POSSIBLE THEORY.

THEN WE HAVE CODE OF CIVIL PROCEDURE 1010 CRC 311(A), AND CASE LAW *PEOPLE VERSUS AMERICAN SURETY INSURANCE COMPANY*, 75 CAL.APP.4TH 719, WHICH STATES THAT

THEY HAVE TO STATE THOSE GROUNDS IN THEIR NOTICED MOTION. THEY DON'T DO THAT. SO IT IS PROCEDURALLY DEFECTIVE. I DON'T BELIEVE THAT WE CAN SEVER OUT THOSE CLAIMS WITHOUT HAVING THEM RE-FILE THEIR MOTION AS STATED ACCURATELY IN [7] THEIR NOTICED MOTION.

IN ANY CASE, WE HAVE PUT THEM ON NOTICE OF THE ADDITIONAL THEORIES, SEAT BACK, SEAT GEOMETRY ISSUES A YEAR AGO IN DISCOVERY RESPONSES.

SO FOR THEM TO SAY THIS IS THE LAST MINUTE, THEY DIDN'T KNOW, IS JUST NOT – NOT REALISTIC. THEY WERE NOTIFIED OF THOSE CLAIMS, AND THIS IS A NOTICED PLEADING STATE, IT IS NO DIFFERENT THAN ALLEGING IN THE COMPLAINT AND THEY KNOW WHAT THE THEORIES WERE. THEIR EXPERTS HAVE LOOKED AT THOSE THEORIES. THEY HAD A CHANCE TO INSPECT THE VEHICLE.

SO THEY HAVEN'T BEEN PREJUDICED BECAUSE THOSE SPECIFIC THEORIES ARE NOT IN OUR COMPLAINT. THEY WERE NOTIFIED OF THOSE A YEAR AGO.

AND I HAVE ATTACHED THOSE DISCOVERY RESPONSES AS EXHIBIT 2 TO OUR REQUEST FOR JUDICIAL NOTICE.

AND, FINALLY, AS FAR AS OUR REQUEST TO AMEND THE COMPLAINT, I BELIEVE THAT IS SIMPLY A REQUEST TO CONFORM THE COMPLAINT TO THE EVIDENCE. IT WOULD NOT INCREASE THE SCOPE OF THE CASE.

AGAIN, THAT INFORMATION HAS BEEN OUT THERE, SO, IT IS JUST A MATTER OF CLEANING THINGS UP AT THIS POINT SO THAT WE CAN DEAL WITH THE PREEMPTION ISSUE IF WE HAVE TO.

THE COURT: ALL RIGHT. ANYTHING FURTHER?

MR. SENIOR: JUST TAKE A LITTLE BIT OF ISSUE WITH THAT. I THINK WHAT THEY'RE DOING IS A LITTLE BIT OF [8] PUTTING THE CART BEFORE THE HORSE.

THE COMPLAINT AS READ, INDICATES THAT MS. WILLIAMSON WAS INJURED AS A RESULT OF JACK-KNIFING OVER THE LAP BELT. THAT IS ALL IT SAYS ABOUT MS. WILLIAMSON'S INJURIES.

IT DOES ALLEGE OTHER DEFECTS IN THE VEHICLE, BUT THAT IS THE ONLY DEFECT AND IT SPECIFICALLY TIES TO – SORRY, MRS. WILLIAMSON'S INJURY.

SECOND OF ALL, THE FIRE INSURANCE VERSUS SUPERIOR COURT 2004 CASE THAT WE CITE, SPECIFICALLY SAYS THAT ON A MOTION FOR JUDGMENT ON THE PLEADINGS, YOU CAN

EXERCISE OUT CLAIMS, VARIOUS CLAIMS, SUCH AS CLAIMS BASED UPON THE DEFECTIVE BELT AND THOSE KIND OF THINGS.

AND, THIRDLY, AND THIS IS WHAT WE SET FORTH IN OUR OBJECTION TO THEIR REQUEST FOR JUDICIAL NOTICE, WE CAN'T LOOK AT THEIR DISCOVERY RESPONSES HERE. WE'RE HERE ON A MOTION FOR JUDGMENT ON THE PLEADINGS.

DISCOVERY RESPONSES, EVIDENTIARY MATTER, IT IS NOT AT ISSUE. WE CAN LOOK AT THE CASE LAW, COMPLAINT, AND THE ANSWER. BUT WE SHOULDN'T BE LOOKING AT DISCOVERY RESPONSES IN DECIDING A MOTION FOR JUDGMENT ON THE PLEADINGS.

MR. SHAYESTEH: I WOULD JUST REFER THE COURT TO PARAGRAPH 18 OF THE SECOND AMENDED COMPLAINT, WHICH STATES: "AS A PROXIMATE RESULT OF THIS COLLISION, THANH WILLIAMSON, WHO IS THE DECEDENT, SUFFERED FATAL ABDOMINAL INJURIES AND [9] INTERNAL BLEEDING," ET CETERA; THE LAST SENTENCE STATES, "THESE INJURIES WOULD NOT HAVE OCCURRED OR THEY WOULD NOT HAVE BEEN AS SEVERE HAD THE DEFENDANTS DESIGNED THE SUBJECT VEHICLE AND ITS COMPONENTS TO BE SAFER AND MORE CRASH WORTHY."

SO WE'RE TALKING ABOUT CRASH WORTHINESS AS TO THE DECEDENT. IT IS NOT

LIMITED TO THE SEAT-BELT CLAIM. AND AS YOUR HONOR HAS ALREADY POINTED OUT, YOU HAVE TO READ THE COMPLAINT AS A WHOLE AND NOT IN BITS AND PIECES.

THE COURT: ALL RIGHT. I WILL TELL YOU WHAT, I BELIEVE THAT I CAN SEPARATE OUT THE JACK-KNIFE, WE WILL CALL IT, ASPECT OF THE – OF LIABILITY. AND I THINK THAT – SO THAT IS WHAT I AM GOING TO DO.

THEN ADDRESSING THE PREEMPTION ARGUMENT HAVING TO DO WITH ANY INJURY THAT WOULD HAVE ARISEN BECAUSE THEY HAD LAP BELT ONLY SEATS AS OPPOSED TO THE LAP BELT AND SHOULDER SEATS, I BELIEVE THE MOVING PARTY IS CORRECT IN THAT REGARD.

IT APPEARS TO ME THAT FEDERAL LAW AND FEDERAL POLICY DEVELOPED IN ALL THESE ARGUMENTS ABOUT THE PLAN THE DEPARTMENT OF THE TRANSPORTATION HAD FOR PHASING IN PASSENGER RESTRAINTS, WOULD PRECLUDE A STATE COURT TORT ACTION THAT WOULD HAVE SUBSTANTIAL IMPACT ON THE FEDERAL SCHEME.

SO I AM GOING TO GRANT THE MOTION FOR JUDGMENT ON THE PLEADINGS TO THE EXTENT OF THAT THEORY OF LIABILITY [10] OF THE LAP ONLY SEAT BELT.

I AGREE WITH COUNSEL FOR THE PLAINTIFF THAT IN THE COMPLAINT, I THINK IT IS ADEQUATELY PLED TO – ADEQUATELY PLED AS TO THE DEATH OF THE DECEDENT, OTHER CAUSES ARE STILL IN THE COMPLAINT. MAYBE IT IS THE DESIGN OF THE ANGLE OF THE SEAT PART OF IT, THE BACK OF THE SEAT, I FORGET EXACTLY, BUT THERE ARE OTHER THEORIES HERE.

SO THOSE THEORIES OF LIABILITY AS TO – FOR THE DECEDENT'S DEATH WOULD SURVIVE, DOESN'T SURVIVE AS TO THE LAP-BELT CLAIM.

I THINK THAT IS ADEQUATELY PLED. BUT WHAT I AM GOING TO DO IS TO GRANT – THERE IS THIS ABOUT IT: IT SEEMS THIS CASE IS TWO-YEARS OLD, BUT MY IMPRESSION IS THAT THIS ISSUE CAME UP FAIRLY RECENTLY.

SO, FOR THAT REASON, I DO THINK THAT THE PLAINTIFF SHOULD HAVE AN OPPORTUNITY TO PUT ON THE PLAINTIFF'S BEST CASE, CONCEAL WITH WHAT THE LAW IS.

SO MY INCLINATION IS TO GRANT THEM LEAVE TO FILED A THIRD AMENDED COMPLAINT, WHICH I UNDERSTAND MAYBE DOESN'T ADD NEW THEORIES, IT IS JUST MORE OR LESS FLUSHING OUT THE IDEA THAT THERE WERE OTHER SIMULTANEOUSLY – SIMULTANEOUS CAUSES OR BASIS OF LIABILITY TO THE DECEDENT'S DEATH.

SO, I AM GOING TO ALLOW THE FILING OF A THIRD AMENDED COMPLAINT. THAT CAN BE DONE SHORTLY, I TAKE IT.

MR. SHAYESTEH: YEAH, WE COULD DO THAT IN 10 DAYS.

[11] **THE COURT:** 10 DAYS. WITHIN 10 DAYS.

NOW, I DON'T KNOW HOW THAT IS GOING TO AFFECT THE TRIAL DATE. I WILL JUST WAIT TO SEE WHAT HAPPENS IN THAT REGARD.

BUT MY FEELING IS IT REALLY SHOULDN'T. I DON'T THINK THERE IS ANYTHING NEW ADDED; BUT, I CAN'T ANSWER THAT.

MR. SHAYESTEH: THERE IS ONE ISSUE, YOUR HONOR, THAT WE ADDRESSED IN OUR OPPOSITION THAT WAS NOT ADDRESSED IN THE MOVING PARTIES PAPERS, AND THAT IS THE ISSUE THAT THE FAILURE TO WARN CLAIM AS TO DEFECT INCLUDING THE SEAT BELTS ARE NOT PREEMPTION. WE CITED AUTHORITY FOR THAT. THEY DIDN'T ADDRESS IN THEIR MOVING PAPERS, BUT THEY HAVE ESSENTIALLY CONCEDED THAT.

I JUST WANT TO CLARIFY THAT WHEN WE FILE OUR AMENDED COMPLAINT, WE'RE STILL GOING TO HAVE A FAILURE TO WARN CLAIM AS TO THE SEAT BELTS.

THE COURT: WELL, I AM NOT SURE HOW YOU – I MEAN, THAT SEEMS LIKE THAT IS RIGHT BACK TO THE SAME ISSUE. THAT THEY HAD A RIGHT, I GUESS AS A PRACTICAL MATTER THEY HAD A RIGHT TO PUT IN A LAP-ONLY BELT IN THE MIDDLE OF THE SEAT, THEN I AM NOT SURE THERE IS ANY DUTY TO WARN.

MR. SENIOR: WELL, CERTAINLY ALLOWING IN A FAILURE TO WARN CLAIM ON THE LAP-BELT ONLY SEATS, WHICH THE – AND NHTSA HAS SAID ARE REQUIRED ON ONE OF THE TWO REQUIRED SYSTEMS, IS ESSENTIALLY JUST BACK-DOORING IN THE SAME [12] ARGUMENT THAT ONE OF THEM IS DEFECTIVE.

THE COURT: YOU CAN HAVE A FAILURE TO WARN ON ANY ON THE MOST EXTENSIVE, EXTREME, UNREQUIRED FOR RESTRAINED OR SAFETY DEVICE. IF ONE MAZDA HAD IN IT SOMETHING OR OTHER, SOME KIND OF AN AIR BAG THAT WENT ALL THE WAY AROUND THE CAR OR SOMETHING, I CAN'T EVEN THINK OF WHAT IT WOULD BE, BUT THAT WOULD BE A BASIS OF A FAILURE TO WARN CAUSE OF ACTION IF YOU DIDN'T HAVE THAT PARTICULAR DEVICE IN THE CAR THAT YOU GOT AN ACCIDENT IN.

MR. SHAYESTEH: THAT IS NOT THE THEORY, YOUR HONOR. THE THEORY IS THEY FAILED TO WARN ABOUT THE DANGERS OF A

LAP-ONLY BELT. SO IT IS NOT THAT THEY'RE FAILING TO WARN THAT YOU COULD HAVE A THREE-POINT, YOU COULD HAVE THIS, THAT IS NOT WHAT WE'RE TALKING ABOUT. THAT IS –

THE COURT: JUST OUT OF CURIOSITY, DID ANY MAZDAS HAVE A THREE-POINT BELT IN THE MIDDLE SEAT?

MR. SENIOR: IN A REAR MIDDLE SEAT IN 1993, I DON'T BELIEVE SO.

THE COURT: I DON'T KNOW. SO YOUR THEORY IS THAT MAZDA WOULD HAVE TO SAY YOU BUY OUR CAR, IF YOU WANT, BUT WE HAVE TO TELL YOU, IT IS A DEATH TRAP IN THE MIDDLE SEAT.

MR. SENIOR: THE POINT IS THAT YOU CAN'T CLAIM YOU FAILED TO WARN OF SOMETHING THAT IS NOT IN AND OF ITSELF DEFECTIVE.

SO IF NHTSA HAS SAID THIS IS A SAFE FORM OF BELT, YOU CAN'T SAY, WELL, YOU FAILED TO WARN THAT THAT IS [13] NOT A SAFE FORM OF BELT.

MR. SHAYESTEH: WELL, YOUR HONOR, THAT IS NOT WHAT THE CASE LAW SAYS. UNDER THE *CARLIN* CASE, 13 CAL.4TH 1104, SUPREME COURT CASE, IT SAYS "FAILURE TO WARN CLAIM IS INDEPENDENT LEGAL THEORY, DOES NOT REQUIRE ANY SHOWING OF DESIGN DEFECT."

WHAT THEY'RE SAYING IS NOT THE LAW.

THE COURT: I HAVEN'T SPENT A LOT OF TIME ON THAT BECAUSE IT DIDN'T SEEM TO BE THE THRUST OF THE CASE.

BUT I THINK OFF THE TOP OF MY HEAD IF YOU FEEL STRONGLY ABOUT PUTTING IT IN THERE, WE WILL PROBABLY LIVE TO VISIT IT ANOTHER DAY.

IT SEEMS TO ME THE THEORY WOULD BE THE SAME, THE SAME PREEMPTION THEORY. THAT IS THE DEPARTMENT OF TRANSPORTATION HAS SET UP THIS PHASE-IN SCHEME THAT THEY HAD BASED ON THEIR PRIOR HISTORY OF TRYING TO COMPEL SOME KIND OF RESTRAINT. AND, SO, A FAILURE TO WARN CAUSE OF ACTION WOULD INTERFERE WITH THAT SCHEME.

IT SEEMS LIKE, TO THE SAME EXTENT THAT THE BASIC TORT CAUSE OF ACTION BASED ON THE THREE-POINT VERSUS THE ONE-POINT OR TWO-POINT, OBVIOUSLY, LAP BELT. IT SEEMS LIKE IT WOULD BE THE SAME ARGUMENT, IS WHAT I AM TRYING TO SAY.

MR. SENIOR: IN ESSENCE THE RESULT WOULD BE THE MARKET CONDITIONS WOULD FORCE ALL VEHICLE MANUFACTURERS TO DO IT.

[14] **THE COURT:** IT SEEMS LIKE WE WOULD BE BACK ADDRESSING THIS BASED ON THE SAME CONCEPT.

SO I THINK THAT WHAT DOES SURVIVE IS ANY OTHER NON-LAP BELT CAUSE THAT YOU CAN ALLEGE AND PROVE, DEALING WITH THE SEAT ANGLE, THE BUMPERS, OR ANYTHING ELSE.

I THINK IT IS JUST THAT LAP-BELT SITUATION THAT SEEMS TO ME THAT BRINGS –

MR. SHAYESTEH: WELL, YOUR HONOR, IF I COULD JUST ASK YOU TO PERHAPS LOOK AT THAT AGAIN. THERE IS ANOTHER CASE WHICH AGAIN SAYS EVEN THOUGH A PRODUCT IS FLAWLESSLY DESIGNED AND MANUFACTURED, IT MAY BE FOUND DEFECTIVE WITHIN GENERAL STRICT LIABILITY PRINCIPLES BECAUSE OF THE FAILURE TO PROVIDE AN ADEQUATE WARNING.

AND THIS IS ANOTHER CALIFORNIA CASE, *PERSONS VERSUS SALOMON NORTH AMERICA*, 217 CAL.APP.3D 168. AGAIN, THEY DON'T ADDRESS THIS ISSUE BECAUSE THEY KNOW THEY CAN'T. THEY HAVE CONCEDED THE ISSUE.

THE COURT: ALL RIGHT. IF YOU – LIKE I SAY, IF YOU'RE CONFIDENT OF THAT WHEN YOU FILE YOUR THIRD AMENDED

COMPLAINT, MAYBE YOU WILL PUT THAT IN THERE.

MR. SHAYESTEH: OKAY.

MR. SENIOR: YOUR HONOR, I THINK I HAVE A PROPOSED ORDER WHICH APART FROM THE THIRD AMENDED COMPLAINT ADDRESSES YOUR RULING. WOULD YOU LIKE TO TAKE A LOOK AT THIS, OR SHALL WE SUBMIT ONE AT A LATER DATE?

THE COURT: WHY DON'T YOU SUBMIT ONE AT A LATER [15] DATE, SEND A COPY OVER TO COUNSEL, HOLD IT A COUPLE DAYS FOR HIM TO TAKE A LOOK AT IT, IF THERE IS NO OBJECTION, I WILL SIGN IT.

MR. SENIOR: WE WILL DO THAT.

THE COURT: PERUSE IT. THANKS VERY MUCH.

MR. SHAYESTEH: THANK YOU.

MR. SENIOR: THANK YOU.

THE CLERK: NOTICE ANYBODY?

MR. SENIOR: NOTICE WAIVED.

THE COURT: NOTICE WAIVED?

MR. SHAYESTEH: NOTICE WAIVED.

MR. TAKAHASHI: WE ARE GOING TO BE SUBMITTING AN ORDER ANYWAY.

THE COURT: OKAY.

(END OF PROCEEDINGS)

* * *

[Reporter's Certificate Omitted In Printing]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
MINUTE ORDER
06-JUL-2006

Dept: C20 CENTRAL JUSTICE CENTER

Convened at: 1:30:00

Judge/Comm: MICHAEL BRENNER

Bailiff: JOE BETANCOURT

Clerk: KA PO CHUNG-MARQUEZ

Reporter: KIMBERLY REX CSR #6638

Court Type: CIVIL

Court Category: WD – OTHER

Case Number: 04CC06494

Case Title: WILLIAMSON VS MAZDA MOTOR OF AMERICA INC

Doct Seq No: 74

Event: 660 MOTION FOR JUDGMENT ON THE PLE

Filing Party: MAZDA MOTOR CORPORATION

Appearances:

PLAINTIFF ATTORNEY GIRARDI & KEESE – Shahram A. Shayesteh

DEFENDANT ATTORNEY BOWMAN AND BROOKE, LLP – Julian G. Senior and Brian Takahashi for defendant Mazda Motor Corp.

Argument heard. Motion for Judgment on the Pleadings is granted. Court will allow Plaintiff to file within 10 days a Third Amended Complaint. Moving Party to submit a Proposed Order for the Court's signature. **ENTERED: 07-06-06 4**

Converted to PDF: 06-JUL-2006 at 5:54:16 PM

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Attorney for Plaintiffs

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson,

Plaintiffs,

vs.

MAZDA MOTOR OF AMERICA, INC., a California corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive,

Defendants.

CASE NO.04CC06494

Hon. Michael Brenner
(Dept, C~~21~~20)

THIRD AMENDED COMPLAINT

1. Strict Products Liability
2. Negligence
3. Intentional Misrepresentation and Concealment
4. Wrongful Death

DEMAND FOR JURY

(Filed Jul 18, 2006)

Plaintiffs DELBERT WILLIAMSON, ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson, and ESTATE OF THANH WILLIAMSON hereby allege as follows:

SUMMARY

1. On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driven by Jack W. Bonzelaar.

2. All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts. Thanh Williamson, however, was killed when the forces generated by this collision and the defective and uncrashworthy design of the MPV caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding. Her husband and daughter, Delbert and Alexa Williamson, were also injured in the accident due to the defective and uncrashworthy design of the MPV.

PARTIES

3. Plaintiff DELBERT WILLIAMSON is an individual who resides in the State of Utah and is the deceased Thanh Williamson's husband.

4. Plaintiff ALEXA WILLIAMSON is an individual who resides in the State of Utah and is Delbert Williamson and the deceased Thanh Williamson's daughter.

5. Plaintiff ESTATE OF THANH WILLIAMSON is the probate estate of the deceased Thanh Williamson and is represented by her Survivors, Delbert Williamson and Alexa Williamson.

6. Defendant MAZDA MOTOR CORPORATION ("MAZDA") is a Japanese corporation, with its principle place of business in Hiroshima, Japan.

7. Defendant MAZDA MOTOR OF AMERICA, INC. ("MAZDA AMERICA") is a California corporation, with its principle place of business in Irvine, California.

8. The true names and/or capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 100, inclusive, are unknown to PLAINTIFFS, who therefore sue said DEFENDANTS by such fictitious names. PLAINTIFFS are informed and believe, and upon such information and belief allege, that each of the DEFENDANTS fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter

referred to, and proximately caused the injuries and damages to PLAINTIFFS hereinafter alleged. PLAINTIFFS will seek leave of Court to Amend this Complaint to assert the true names and/or capacities of such fictitiously named DEFENDANTS when the same have been ascertained.

9. PLAINTIFFS are informed and believe, and thereupon allege, that at all times mentioned herein, DEFENDANTS, including DOES 1 through 100, were the agents, servants, employees and/or joint venturers of their co-DEFENDANTS, and were, as such, acting within the course, scope and authority of said agency, employment and/or joint venture, and that each and every DEFENDANT, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every DEFENDANT as an agent, employee and/or joint venturer.

10. Defendants MAZDA, MAZDA AMERICA, and DOES 1 through 100 are at all times herein mentioned were engaged in the business of selling, manufacturing, designing, testing, engineering, marketing, modifying, assembling, inspecting, distributing, and controlling Mazda MPV Minivans and other similar automobiles. MAZDA, MAZDA AMERICA, and DOES 1 through 100 market, distribute, sell, modify and repair their vehicles, including the 1993 Mazda MPV Minivan, within the County of Orange, State of California.

11. MAZDA, MAZDA AMERICA, and DOES 1 through 100 knew, expected and intended the 1993

Mazda MPV and other similar automobiles and/or substantially similar automobiles to be used for the purposes of transporting persons and property.

12. MAZDA, MAZDA AMERICA, and DOES 1 through 100 at all times herein mentioned knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles and/or substantially similar automobiles and their component parts would be purchased and used by the purchaser or user without inspection for defects or dangerous propensities or properties therein or in any of its component parts.

13. MAZDA, MAZDA AMERICA, and DOES 1 through 100 knew, expected and intended that the 1993 Mazda MPV Minivan and other similar automobiles, including its component parts, were highly dangerous and equipped with hazardous instrumentalities to persons riding in them and/or in close proximity to them should such automobile, particularly its restraint systems, or any associated parts or components and/or the design, materials, workmanship, configuration, or location thereof be in any manner defective or fail use.

THE ACCIDENT

14. On August 14, 2002, Delbert Williamson, Thanh Williamson, and their daughter, Alexa Williamson, were traveling in their 1993 Mazda MPV Minivan ("SUBJECT VEHICLE"), heading north on Route 89 in Kane County, Utah. Delbert was driving

the SUBJECT VEHICLE, Thanh was sitting in the middle seat of the middle row of seats, and Alexa was sitting just behind Delbert in the middle row, next to her mother. Plaintiffs were all wearing their seatbelts, but whereas Delbert and Alexa were wearing three-point seatbelts, Thanh was only wearing a two-point seatbelt or lap belt.

15. Meanwhile, Jack W. Bonzelaar was driving a motor home, heading south on Route 89, towing a 1998 Jeep Wrangler using a "Blue Ox" tow bar. Suddenly, the Jeep Wrangler became detached from Bonzelaar's motor home and crossed the center divider line of Route 89, striking the SUBJECT VEHICLE being driven by Delbert Williamson.

16. As a proximate result of this collision, Thanh Williamson suffered fatal abdominal injuries and internal bleeding, Delbert Williamson suffered fractures to the right wrist, ankle and foot, and Alexa Williamson suffered abdominal contusions and mesenteric hematoma, requiring surgical intervention. These injuries would not have occurred or they would not have been as severe had MAZDA, MAZDA AMERICA, and DOES 1 through 100 designed the SUBJECT VEHICLE and its components to be safer and more crashworthy.

FEDERAL MOTOR VEHICLE SAFETY STANDARD 208

17. In 1996, Congress passed the National Traffic and Motor Vehicle Safety Act of 1996, 15

U.S.C. §§ 1381-1431 (the "Safety Act"), "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve that goal, Congress empowered the federal Department of Transportation to issue minimum safety standards for motor vehicle performance. See 15 U.S.C. §§ 1391(2), 1392(a). The Department, in turn, delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. NHTSA fulfilled its responsibility by promulgating the Federal Motor Vehicle Safety Standards ("FMVSS") published at 49 C.F.R. §§ 571.1-.302. The FMVSS are *minimum* standards that a vehicle must meet in order to be sold in the United States.

18. Most of the FMVSS are "performance" standards, which set forth how a vehicle must perform under certain circumstances. The most recognizable example of a performance standard is the crash testing section of FMVSS 208, which specifies the maximum injury criteria levels for crash test dummies in particular types of barrier impacts. The FMVSS also contain "design" standards, which dictate the parameters of how certain components are actually designed or placed in the vehicle. One example of a design standard is FMVSS 210, which dictates certain zones in which seat belt anchors must be installed.

19. The Safety Act also includes a "savings" clause that provides that "[c]ompliance with any Federal motor vehicle safety standard issued under

this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, the U.S. Supreme Court construed this clause as evidencing Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

20. At the time the SUBJECT VEHICLE was manufactured, Federal Motor Vehicle Safety Standard ("FMVSS") 208 permitted auto manufacturers to install either two-point lap belts (a "Type 1" system) or three-point lap/shoulder belts (a "Type 2" system) in the rear-center seats of their cars. See 49 C.F.R. § 571.208 S.4.1.4.2. (1990).

21. The relevant version of FMVSS 208 first took effect in 1968, when NHTSA passed its initial set of motor vehicle safety standards. See 32 Fed. Reg. 2408 (February 3, 1967). At that time, FMVSS 208 required the installation of lap/shoulder belts at the drivers' and right-front passengers' seating positions, and either lap belts or lap/shoulder belts at every other designated seating position (i.e. the center front seat and all rear seats). *Id.* at 2415. In the preamble accompanying the final rule, NHTSA characterized this rule as a "minimum safety standard" within the meaning of the Safety Act. 32 Fed. Reg. at 2408. The regulatory preamble contained no further explanation or statement of policy with respect to the agency's decision to give car makers the option of installing

either lap belts or lap/shoulder belts in rear seating positions. *See id.*

22. In 1986, the National Transportation Safety Board ("NTSB") issued a Safety Recommendation with respect to lap/shoulder belts. Among other things, the NTSB concluded that "[l]ap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury. . . ." The NTSB further observed that "such systems appear to work effectively even for children, and they can be used with child safety seats and booster seats." The NTSB ultimately recommended that, "[g]iven the known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems." With respect to the industry, the NTSB recommended that "early action . . . be taken to provide aftermarket retrofit assemblies to convert lap/only belts to lap/shoulder belts." The NTSB further found that such "retrofit assemblies" may be technically feasible "at very [sic] seating location," including rear-center seats. With respect to new cars, the NTSB recommended that all rear seats – including rear center seats – be equipped with lap-shoulder belts.

23. In 1988, NHTSA proposed to amend FMVSS 208 to require lap/shoulder belts in all rear outboard seating positions of passenger cars. See 53 Fed. Reg.

47982 (November 29, 1988). In its Notice of Proposed Rulemaking, NHTSA stated that it had decided not to propose a rear-center seat requirement based on manufacturers' complaints that the costs of installing lap/shoulder belts in rear-center seats might exceed the anticipated safety benefits. See *id.* at 47984. At no point did NHTSA state that lap/shoulder belts would be unsafe in rear-center seats, or that it affirmatively sought to give car makers the unfettered choice between installing lap belts or lap/shoulder belts in that seating position. To the contrary, it emphasized that "[r]ear seat lap/shoulder belts are estimated to be more effective than rear seat lap belts in reducing fatalities and moderate-to-severe injuries." *Id.* at 47982.

24. In 1989, NHTSA published a final rule requiring lap/shoulder belts in all rear-outboard seats, but retaining the regulatory option with respect to rear-center seats. See 54 Fed. Reg. 25275 (June 14, 1989). The regulatory preamble once again emphasized that "NHTSA believes that lap/shoulder belts would be more effective than lap-only belts in rear seating positions." *Id.*

25. In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars. Among other things, the study compared the fatality risk for lap/shoulder belted occupants to the risk for lap-belted occupants. NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts [in rear outboard seats] *has significantly enhanced occupant*

protection, especially in frontal crashes." NHTSA added that:

> In all crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone. . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent.

26. In December 2002, President Bush signed into law a bill known as "Anton's Law," which provides for the improvement of child safety devices when installed in motor vehicles. See Pub. Law No. 107-318. One of the provisions of Anton's Law concerns the installation of lap/shoulder belts in rear-center seating positions. Specifically, Section 5(a) of the law directs NHTSA to amend FMVSS 208 to require lap/shoulder belts in rear-center seats by no later than December 2004.

27. Compelled by this statutory directive, on August 2003, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (August 2, 2003). At the time, NHTSA stated that Anton's Law is "fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its notice of proposed rulemaking, NHTSA once again emphasized the special safety benefits of lap/shoulder belts for children, stating that "one of

the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a lap/shoulder belt made available in rear center seating positions. When these lap/shoulder belts are installed in the rear center seating position, there will be an additional, and potentially safer, seating position available for a child in a belt-positioning booster seats." *Id.* at 46548. NHTSA further emphasized that requiring lap/shoulder belts in rear-center seats would not just benefit children: [i]t would also benefit older occupants." *Id.*

THE DEFECTIVE MAZDA MPV

28. MAZDA, MAZDA AMERICA, and DOES 1 through 100, designed, tested, manufactured, assembled, distributed, marketed, and sold the SUBJECT VEHICLE.

29. At the time of its manufacture and retail sale by MAZDA, MAZDA AMERICA, and DOES 1 through 100, the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe for its intended purposes and uses in that, among other respects:

a. The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson

from "jackknifing" around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE;

b. The angle, geometry, and composition of the seat bottom of the center and driver's side seating positions of the middle bench seat were inferior and unsafe in that they were unreasonably susceptible to ramping and submarining of passengers seated in those positions in frontal collisions;

c. The seat backs of the center and driver's side seating positions of the middle bench seat were inferior and unsafe in that they did not sufficiently withstand foreseeable forces in a frontal collision and folded forward causing Thanh and Alexa's upper torsos to further lean forward;

d. The entire vehicle did not contain sufficient energy-absorbing materials and structures to absorb reasonable amounts of force from a frontal collision, such that it was not reasonably crashworthy;

e. The front driver's side seating area lacked sufficient survival space, such that in a frontal collision, the driver's seat is dangerously compromised.

30. MAZDA, MAZDA AMERICA, and DOES 1 through 100, breached their duty of care to PLAINTIFFS by failing to use reasonable care in the

manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE, as follows:

a. MAZDA, MAZDA AMERICA, and DOES 1 through 100 had knowledge, prior to the sale of the SUBJECT VEHICLE to PLAINTIFFS, of the defects alleged in paragraph 29 above, but failed to adequately warn and instruct PLAINTIFFS and other consumers about the hazards, risks, and dangers of such defects;

b. MAZDA, MAZDA AMERICA, and DOES 1 through 100 failed to adequately evaluate and test the performance and crashworthiness of the SUBJECT VEHICLE, particularly with respect to the defects alleged in paragraph 29 above;

c. MAZDA, MAZDA AMERICA, and DOES 1 through 100 failed to make necessary modifications to the design of the SUBJECT VEHICLE after receiving notice of the defects alleged in paragraph 29 above;

d. MAZDA, MAZDA AMERICA, and DOES 1 through 100 included false and misleading information in advertising that misrepresented the safety features of the vehicle associated with the parts discussed in paragraph 29 above and failed to adequately apprise prospective purchasers of the latent defects associated

with the parts discussed in paragraph 29 above; and

e. MAZDA, MAZDA AMERICA, and DOES 1 through 100 failed to recall and repair the defects alleged in paragraph 29 above.

31. The defects and failures alleged in paragraphs 29 and 30 above were joint and concurrent causes of Plaintiff's injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together. For example, the injuries to Thanh Williamson were the result of all of the defects alleged in paragraph 29, subsections (a)-(d), each defect acting in tandem to cause her severe abdominal injuries. But for the presence of all of these defects, Thanh Williamson's injuries would not have been as severe nor would she have died from her injuries.

32. MAZDA, MAZDA AMERICA, and DOES 1 through 100 have known for decades about the dangers associated with lap-only seatbelts in frontal collisions. Despite this knowledge and the fact that frontal collisions account for over 60% of all collisions, MAZDA, MAZDA AMERICA, and DOES 1 through 100 have engaged in despicable conduct in willful and conscious disregard of the safety of consumers by marketing and selling the SUBJECT VEHICLE as safe, when it was not, and failing to disclose to consumers the dangers associated with lap-only seatbelts in frontal collisions.

33. MAZDA, MAZDA AMERICA, and DOES 1 through 100, have conducted testing of lap-only seatbelts in comparison to three-point seatbelts. Those tests revealed that three-point seatbelts are far more effective in reducing abdominal, spinal, and other severe injuries in frontal collisions when compared to lap-only seatbelts. Despite this knowledge, MAZDA, MAZDA AMERICA, and DOES 1 through 100 engaged in despicable conduct in willful and conscious disregard of the safety of consumers by choosing to utilize a lap-only seatbelt for the center seating position of the middle bench seat in the SUBJECT VEHICLE instead of a three-point seatbelt, even though three-point seatbelts were technically feasible at the time of the design and manufacture of the SUBJECT VEHICLE. Equipping the SUBJECT VEHICLE with a three-point seatbelt in that seat would have cost MAZDA, MAZDA AMERICA, and DOES 1 through 100 less than $50 per vehicle.

34. Various government-sponsored automotive safety institutes, including NHTSA, have given the SUBJECT VEHICLE the lowest possible rating in crash tests, due in large part to its poor crashworthiness and defective lap-only seat belt.

35. Despite the overwhelming evidence of the risks associated with lap belt only systems from *almost 40 years ago* to the present, MAZDA, MAZDA AMERICA, and DOES 1 through 100 have repeatedly lobbied ("NHTSA") to forego its suggested implementation of a new FMVSS which would have

required three-point belts at all seating locations in motor vehicles sold to the public.

36. Despite empirical medical/scientific evidence and urgings by NHTSA and the NTSB, MAZDA, MAZDA AMERICA, and DOES 1 through 100 continued to manufacture the SUBJECT VEHICLE with lap-only belts. On August 8, 1986, the NTSB issued a safety recommendation to auto manufacturers. In this safety recommendation, the chairman of the NTSB noted that its own investigation concluded that *the crash performance of lap-only belts was "very poor."* The NTSB went on to state: "Furthermore, *the Safety Board believes that it may be technically feasible to provide 3 -point, lap/shoulder belts at every seating location*; if so, such systems should be required as soon as possible. As long ago as the 1970s, the NHTSA proposed such a requirement, at least for passenger cars." The NTSB also stated: "It may be argued that the center front and center rear seating locations in passenger cars have the lowest rates of occupancy, and that therefore it is not warranted to provide the superior protection of lap/shoulder belts at these locations. *The Safety Board believes that, to the extent these seating positions are used, their occupants deserve crash protection equal to those provided for other occupants."*

37. As a proximate result of the hereinabove and hereinafter alleged acts, omissions, and conduct of MAZDA, MAZDA AMERICA, AND DOES 1 through 100, PLAINTIFFS have been injured: sustaining temporary and permanent injuries to their

body and nervous system, and severe mental and emotional pain and suffering, by virtue of their own injuries and by having witnessed the suffering and death of Thanh Williamson (Dillon v. Legg (1968) 68 Cal.2d 728), while also being physically injured and in the "zone of danger" (Utah law of compensatory damages for emotional distress as set forth by Utah Supreme Court in *Johnson v. Rogers* 763 P2d 711, 735 (1988) and *Hansen v. Sea Ray Boats,* 830 P2d 236, 238-239 (1992)), all to their general damage in an amount in excess of the minimum jurisdictional limits of the above-entitled Court and to be determined at trial.

38. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100, PLAINTIFFS have incurred and will in the future incur medical expenses for, among other things, physicians, surgeons, medical and nursing attendants, hospital bills, x-rays and other medical care, in a sum to be determined at trial.

39. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100, Plaintiff Delbert Williamson has suffered loss of wages and a loss of earning capacity, in a sum to be determined at trial.

40. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through

100, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

41. As a proximate result of the death of Thanh Williamson, which occurred only after she suffered several hours of severe pain and suffering, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum to be determined at trial.

42. As a proximate result of the hereinabove alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100, PLAINTIFFS have incurred various and sundry losses and expenses, in a sum to be determined at trial.

FIRST CAUSE OF ACTION FOR STRICT PRODUCTS LIABILITY

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS OF THANH WILLIAMSON, AGAINST MAZDA, MAZDA AMERICA, AND DOES 1 through 100)

43. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

44. MAZDA, MAZDA AMERICA, and DOES 1 through 100 manufactured, designed, tested, marketed, sold, and were responsible for warning of any risks or dangers of the SUBJECT VEHICLE and its component parts. MAZDA, MAZDA AMERICA, and DOES 1 through 100 knew, or should have known, that the SUBJECT VEHICLE and its component parts would be purchased and used by consumers without inspection for defects or hazards.

45. At the time of its manufacture and retail sale by MAZDA, MAZDA AMERICA, and DOES 1 through 100 the SUBJECT VEHICLE was defective, uncrashworthy, and unsafe as described in paragraphs 29 and 30 above, and MAZDA, MAZDA AMERICA, and DOES 1 through 100 failed to warn PLAINTIFFS and other consumers about said defects.

46. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, AND DOES 1 through 100, PLAINTIFFS have suffered damages as alleged above.

47. As alleged above, the conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100 constitutes malice, oppression, and fraud under Civil Code § 3294. Therefore, PLAINTIFFS are entitled to an award of punitive damages.

SECOND CAUSE OF ACTION FOR NEGLIGENCE

(BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST MAZDA, MAZDA AMERICA, AND DOES 1 through 100)

48. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

49. MAZDA, MAZDA AMERICA, and DOES 1 through 100 owed a duty of care to the PLAINTIFFS in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE as described in paragraphs 29 and 30 above.

50. MAZDA, MAZDA AMERICA, and DOES 1 through 100 breached their duty of care to PLAINTIFFS by failing to use reasonable care in the manufacture, design, testing, marketing, selling, and warning of any risks or dangers of the SUBJECT VEHICLE as described in paragraphs 29 and 30 above.

51. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, AND DOES 1 through 100, PLAINTIFFS have suffered damages as alleged above.

THIRD CAUSE OF ACTION

FOR INTENTIONAL MISREPRESENTATION AND CONCEALMENT (BY PLAINTIFFS, ON THEIR OWN BEHALF AND AS SURVIVORS, AGAINST MAZDA, MAZDA AMERICA, and DOES 1 through 100)

52. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

53. MAZDA, MAZDA AMERICA, and DOES 1 through 100 knew that the SUBJECT VEHICLE was defective as alleged in paragraphs 29 and 30 above because their own research demonstrated these presence and likelihood of these defects. Despite these known dangers to PLAINTIFFS and other consumers, MAZDA, MAZDA AMERICA, and DOES 1 through 100 marketed and advertised that the SUBJECT VEHICLE as safe and free from defects. These representations were materially false.

54. MAZDA, MAZDA AMERICA, and DOES 1 through 100 intentionally suppressed material facts about the known dangerous propensities of the defects alleged in paragraphs 29 and 30 above. MAZDA, MAZDA AMERICA, and DOES 1 through 100 were under a duty to disclose to PLAINTIFFS and other consumers all known material facts regarding the defects alleged in paragraphs 29 and 30 above.

55. MAZDA, MAZDA AMERICA, and DOES 1 through 100 intentionally concealed and suppressed the known material facts regarding the defects alleged in paragraphs 29 and 30 above with the intent to defraud and induce PLAINTIFFS and other consumers to purchase and use the SUBJECT VEHICLE.

56. PLAINTIFFS, as purchasers and users of the SUBJECT VEHICLE, reasonably and justifiably relied on MAZDA, MAZDA AMERICA, and DOES 1 through 100's misrepresentations and nondisclosures regarding the defects alleged in paragraphs 29 and 30 above. Because of MAZDA, MAZDA AMERICA, and DOES 1 through 100's material misrepresentations and nondisclosures, PLAINTIFFS lacked complete information regarding the defects alleged in paragraphs 29 and 30 above, and the likelihood of grave injury and/or death to passengers in the event of a frontal collision.

57. As a proximate result of the hereinabove and hereinafter alleged acts, omissions and conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100, PLAINTIFFS have suffered damages as alleged above.

58. As alleged above, the conduct of MAZDA, MAZDA AMERICA, and DOES 1 through 100 constitutes malice, oppression, and fraud under Civil Code § 3294. Therefore, PLAINTIFFS are entitled to an award of punitive damages.

FOURTH CAUSE OF ACTION FOR WRONGFUL DEATH

(BY PLAINTIFFS DELBERT WILLIAMSON AND ALEXA WILLIAMSON AGAINST MAZDA, MAZDA AMERICA, AND DOES 1 through 100)

59. PLAINTIFFS refer to, repeat, and reallege each of the allegations of the foregoing paragraphs of this Complaint and incorporate said allegations into this Cause of Action as though fully set forth herein.

60. As a proximate result of the death of Thanh Williamson, Delbert Williamson, her husband, and Alexa Williamson, her daughter, have suffered and will continue to suffer from the loss of Thanh Williamson's love, affection, support, counsel, comfort, and society, all to their general damage in a sum in excess of the minimum jurisdiction of the above-entitled court.

61. As a proximate result of the death of Thanh Williamson, Delbert Williamson has incurred funeral and burial expenses for Thanh Williamson, in a sum to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray for judgment against MAZDA, MAZDA AMERICA, AND DOES 1 through 100 as follows:

FIRST CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For punitive damages;

6. For such other and further relief as the court deems just and proper.

SECOND CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For such other and further relief as the court deems just and proper.

THIRD CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For punitive damages;

6. For such other and further relief as the court deems just and proper.

FOURTH CAUSE OF ACTION

1. For compensatory and general damages according to proof;

2. For special and incidental damages according to proof;

3. For costs of suits incurred herein;

4. For pre-judgment interest according to law and proof;

5. For such other and further relief as the court deems just and proper.

JURY DEMAND

PLAINTIFFS hereby demand a trial by jury on all claims so triable.

DATED: July 17, 2006

GIRARDI | KEESE

/s/ [Illegible]
DAVID R. LIRA
Attorneys for PLAINTIFFS

[Proof Of Service Omitted In Printing.]

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MAZDA MOTOR OF AMERICA, INC. d/b/a
MAZDA NORTH AMERICAN OPERATIONS, INC.

**SUPERIOR COURT OF
THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF ORANGE –
CENTRAL JUSTICE CENTER**

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williams [sic] and Alexa Williamson, Plaintiffs vs. MAZDA MOTOR OF AMERICA, Inc.,	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** **[PROPOSED] ORDER GRANTING: MAZDA MOTOR CORPORATION'S MOTION FOR JUDGMENT ON THE PLEADINGS** (Filed Aug. 11, 2006)

a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**[CCP 438 and common law]** **Date: July 6, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

The motion of Defendant Mazda Motor Corporation for judgment on the pleadings came on regularly for hearing in this Court on July 6, 2006 at 1:30 p.m. Mazda Motor Corporation ("MC") was represented by its counsel of record, Bowman and Brooke LLP by Brian Takahashi, Esq. and Julian G. Senior, Esq.; plaintiffs Delbert Williamson, Alexa Williamson, through her guardian ad litem Delbert Williamson, and the Estate of Thanh Williamson, through her survivors, Delbert Williamson and Alexa Williamson, were represented by their counsel, Girardi Keese, by and through Shahram A. Shayesteh, Esq.

The Court, having read the moving papers, including the exhibits, the opposition, including the exhibits, and the reply brief, including the exhibits, having heard oral argument and considered the complexities of this case and finding good cause therefor,

IT IS HEREBY ORDERED THAT:

1. MC's motion for judgment on the pleadings is granted in part as described below;

2. On the first cause of action for strict liability, plaintiffs' claims as survivors of Thanh Williamson failed to state a claim sufficient to constitute a cause of action to the extent those claims arise from an alleged design defect or failure to warn based on the lack of a lap shoulder seat belt in the center rear seating position (where decedent Thanh Williamson was seated during the accident). Such claims are preempted, and judgment is therefore granted on the first cause of action without leave to amend as to the design defect claim, and judgment is granted with 10 days leave to amend with respect to the failure to warn claim.

3. On plaintiffs' second cause of action for negligence, plaintiffs' claims as survivors of Thanh Williamson failed to state a claim sufficient to constitute a cause of action to the extent those claims arise from an alleged design defect or failure to warn based on the existence of a lap-only seat belt in the center rear seating position (where decedent Thanh Williamson was seated during the accident). Such claims are preempted, and judgment is therefore granted on the second cause of action without leave to amend as to the design defect claim, and judgment is granted with 10 days leave to amend with respect to the failure to warn claim.

4. On plaintiffs' third cause of action, for intentional misrepresentation and concealment, plaintiffs' claims as survivors of Thanh Williamson failed to state a claim sufficient to constitute a cause of action to the extent those claims arise from an alleged design defect or failure to warn based on the existence of a lap-only seat belt in the center rear seating position (where decedent Thanh Williamson was seated during the accident). Such claims are barred by the doctrine of preemption. Such claims are preempted, and judgment is therefore granted on the third cause of action without leave to amend as to the design defect claim, and judgment is granted with 10 days leave to amend with respect to the failure to warn claim;

5. On plaintiffs' fourth cause of action, plaintiffs' claims as survivors of Thanh Williamson failed to state a claim sufficient to constitute a cause of action to the extent those claims arise from an alleged design defect or failure to warn based on the existence of a lap-only seat belt in the center rear seating position (where decedent Thanh Williamson was seated during the accident). Such claims are preempted, and judgment is therefore granted on the fourth cause of action without leave to amend as to the design defect claim, and judgment is granted with 10 days leave to amend with respect to the failure to warn claim.

IT IS SO ORDERED.

DATED: AUG 11 2006 /s/ Michael Brenner
MICHAEL BRENNER,
JUDGE OF THE
SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation;	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** **DEFENDANTS MAZDA MOTOR CORPORATION AND MAZDA MOTOR OF AMERICA, dba MAZDA NORTH AMERICAN OPERATIONS'**

FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; [PROPOSED] ORDER** **[FILED CONCURRENTLY WITH DEMURRERS]** **Date: 9/19/06** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 11/06/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on September 19, 2006 at 1:30 p.m. or as soon thereafter as the matter may be heard, in Department "C20" of the above entitled Court, located at 700 Civic Center Drive., West, Santa Ana, California 92701, Defendants Mazda Motor Corporation ("MC") and Mazda Motor of

America, dba Mazda North American Operations ("MNAO"), will move the Court for an order striking the following portions of Plaintiff's Third Amended Complaint ("Complaint") served on or about July 18, 2006. (For the Court's convenience, Defendants have numbered the paragraphs as listed in the Third Amended Complaint):

> 17. In 1996, Congress passed the National Traffic and Motor Vehicle Safety Act of 1996, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve that goal, Congress empowered the federal Department of Transportation to issue minimum safety standards for motor vehicle performance. See 15 U.S.C. §§ 1391(2), 1392(a). The Department, in turn, delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. NHTSA fulfilled its responsibility by promulgating the Federal Motor Vehicle Safety Standards ("FMVSS") published at 49 C.F.R. §§ 571.1-302. The FMVSS are *minimum* standards that a vehicle must meet in order to be sold in the United States.
>
> 18. Most of the FMVSS are "performance" standards, which set forth how a vehicle must perform under certain circumstances. The most recognizable example of a performance standard is the crash testing section of the FMVSS 208, which specifies

the maximum injury criteria levels for crash test dummies in particular types of barrier impacts. The FMVSS also contain "design" standards, which dictate the parameters of how certain components are actually designed or placed in the vehicle. One example of a design standard is FMVSS 210, which dictates certain zones in which seat belt anchors are installed.

19. The Safety Act also includes a "savings" clause that provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, the U.S. Supreme Court construed this clause as evidencing Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

20. At the time the SUBJECT VEHICLE was manufactured, Federal Motor Vehicle Safety Standard ("FMVSS") 208 permitted auto manufacturers to install either two-point lap belts (a "Type 1" system) or three-point lap/shoulder belts (a "Type 2" system) in the rear-center seats of their cars. See 49 C.F.R. § 571.208 S.4.1.4.2. (1990).

21. The relevant version of FMVSS 208 first took effect in 1968, when NHTSA passed its initial set of motor vehicle safety

standards. See 32 Fed. Red. 2408 (February 3, 1967). At that time, FMVSS 208 required the installation of lap/shoulder belts at the drivers' and right-front passengers' seating positions, and either lap belts or lap/shoulder belts at every other designated seating position (i.e. the center front seat and all rear seats). *Id.* at 2415. In the preamble accompanying the final rule, NHTSA characterized this rule as a "minimum safety standard" within the meaning of the Safety Act. 32 Fed. Reg. at 2408. The regulatory preamble contained no further explanation of statement of policy with respect to the agency's decision to give car makers the option of installing either lap belts or lap/shoulder belts in rear seating positions. *See id.*

22. In 1986, the National Transportation Safety Board ("NTSB") issued a Safety Recommendation with respect to lap/shoulder belts. Among other things, the NTSB concluded that "lap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury. . . ." The NTSB further observed that "such systems appear to work effectively even for children, and they can be used in child safety seats and booster seats." The NTSB ultimately recommended that, "[g]iven then known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and

industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems." With respect to the industry, the NTSB recommended that "early action . . . , be taken to provide aftermarket retrofit assemblies to convert lap/only belts to lap/shoulder belts." The NTSB further found that such "retrofit assemblies" may be technically feasible "at very [sic] seating location," including rear-center seats. With respect to new cars, the NTSB recommended that all rear seats – including rear center seats – be equipped with lap-shoulder belts.

23. In 1988, NHTSA proposed to amend FMVSS 208 to require lap/shoulder belts in all rear outboard seating positions of passenger cars. See 53 Fed. Reg. 47982 (November 29, 1988). In it [sic] Notice of Proposed Rulemaking, NHTSA stated that it had decided not to propose a rear-center seat requirement based on manufacturers' complaints that the costs of installing lap/shoulder belts in rear-center seats might exceed the anticipated safety benefits. See *id.* at 47984. At no point did NHTSA state that lap/shoulder belts would be unsafe in rear-center seats, or that it affirmatively sought to give car makers the unfettered choice between installing lap belts or lap/shoulder belts in that seating position. To the contrary, it emphasized that "[r]ear seat lap/shoulder belts are estimated to be more effective than rear seat lap belts in reducing

fatalities and moderate-to-severe injuries." *Id.* at 47982.

24. In 1989, NHTSA published a final rule requiring lap/shoulder belts in all rear-outboard seats, but retaining option with respect to rear-center seats. See 54 Fed. Reg. 25275 (June 14, 1989). The regulatory preamble once again emphasized that "NHTSA believes that lap/shoulder belts would be more effective than lap-only belts in rear seating positions." *Id.*

25. In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars. Among other things, the study compared the fatality risk for lap/shoulder belted occupants to the risk for lap-belted occupants. NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts [in rear outboard seats] *has significantly enhanced occupant protection, especially in frontal crashes.*" NHTSA added that:

> In all crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent.

26. In December 2002, President Bush signed into law a bill known as "Anton's Law," which provides for the improvement of child safety devices when installed in motor vehicles. See Pub. Law No. 107-318. One of the provisions of Anton's Law concerns the installation of lap/shoulder belts in rear-center seating positions. Specifically, Section 5(a) of the law directs NHTSA to amend FMVSS 208 to require lap/shoulder belts in rear-center seats by no later than December 2004.

27. Compelled by this statutory directive, on August 2003, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (august 2, 2003). At the time, NHTSA stated that Anton's Law is "fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its notice of proposed rulemaking, NHTSA once again emphasized the special safety benefits of lap/shoulder belts for children, stating that "one of the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a lap/shoulder belt made available in rear center seating positions. When these lap/shoulder belts are installed in the rear center seating position, there will be an additional, and potentially safer, seating position available for a child in a belt-positioning booster seats." *Id.* at 46548. NHTSA further emphasized that requiring

lap/shoulder belts in rear-center seats would not just benefit children: [i]t would also benefit older occupants." *Id.*

29(a). The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from "jackknifing" around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE.

31. The defects and failures alleged in paragraphs 29 and 30 above were joint and concurrent causes of Plaintiffs injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together. For example, the injuries to Thanh Williamson were the result of all of the defects alleged in paragraph 29, subsections (a)-(d), each defect acting in tandem to cause her severe abdominal injuries. But for the presence of all of these defects, Thanh Williamson's injuries would not have been as severe nor would she have died from her injuries.

33. MAZDA, MAZDA AMERICA, and DOES 1 through 100, have conducted testing of lap-only seatbelts in comparison to three-point seatbelts. Those tests revealed that three-point seatbelts are far more effective in reducing abdominal, spinal, and other severe

injuries in frontal collisions when compared to lap-only seatbelts. Despite this knowledge, MAZDA, MAZDA AMERICA, and DOES 1 through 100 engaged in despicable conduct in willful and conscious disregard of the safety of consumers by choosing to utilize a lap-only seatbelt for the center seating position of the middle bench seat in the SUBJECT VEHICLE instead of a three-point seatbelts, even through three-point seatbelts were technically feasible at the time of the design and manufacture of the SUBJECT VEHICLE. Equipping the SUBJECT VEHICLE with a three-point seatbelt in that seat would have cost MAZDA, MAZDA AMERICA, and DOES 1 through 100 less than $50 per vehicle.

34. Various government-sponsored automotive safety institutes, including NHTSA, have given the SUBJECT VEHICLE the lowest possible rating in crash tests, due in large part to its poor crashworthiness and defective lap-only seat belt.

35. Despite the overwhelming evidence of the risks associated with lap belt only systems from *almost 40 years ago* to the present, MAZDA, MAZDA AMERICA, and DOES 1 through 100 have repeatedly lobbied ("NHTSA") to forego its suggested implementation of a new FMVSS which would have required three-point belts at all seating locations in motor vehicles sold to the public.

36. Despite empirical medical/scientific evidence and urgings by NHTSA and the NTSB, MAZDA, MAZDA AMERICA, and DOES 1 through 100 continued to manufacture the SUBJECT VEHICLE with lap-only belts. On August 8, 1986, the NTSB issued a safety recommendation to auto manufacturers. In this safety recommendation, the chairman of the NTSB noted that its own investigation concluded that *the crash performance of lap-only belts was "very poor."* The NTSB went on to state: "Furthermore, *the Safety Board believes that it may be technically feasible to provide 3-point, lap/shoulder belts at every seating location*; if so, such systems should be required as soon as possible. As long ago as the 1970s, the NHTSA proposed such a requirement, at least for passenger cars." The NTSB also stated: "It may be argued that the center front and center rear seating locations in passenger cars have the lowest rates of occupancy, and that therefore it is not warranted to provide the superior protection of lap/shoulder belts at these locations. *The Safety Board believes that, to the extent these seating positions are used, their occupants deserve crash protection equal to those provided for other occupants.*"

In addition, Defendants also move to strike all of Plaintiffs' failure to warn claims wherever they appear, to the extent they relate to Plaintiffs' lap-belt only theory. **Furthermore**, since Plaintiffs tie all claims relating to the death of Thanh Williamson to the barred lap-belt only claim, Defendants ask the

Court to strike all claims relating to the injuries and death of Thanh Williamson.

Defendants' Motion to Strike is based on the grounds that these portions of the Third Amended Complaint constitute irrelevant and/or improper matter, and were not drawn in conformance with the laws of this state, this Court's rulings and the permission the Court granted Plaintiffs to amend. The Court already ruled that Plaintiffs may not assert causes of action based upon the fact that the vehicle had a lap belt only when MC moved for judgment on the pleadings as to the Second Amended Complaint. Moreover, no failure to warn claim can be based on the lap-belt only use in the MPV. Defendants' Motion to Strike is brought pursuant to California Civil Code Section 3294(b), and California Code of Civil Procedure Sections 435 and 436.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the records and pleadings on file herein, including MC's Motion for Judgment on the Pleadings and the Court's Ruling thereon, upon the concurrently filed Demurrers and supporting papers, and on such further oral and documentary evidence as may be presented to the Court at the hearing of this matter.

Dated: August 22, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendant
MAZDA MOTOR CORPORATION and MAZDA MOTOR OF AMERICA, INC. dba MAZDA NORTH AMERICAN OPERATIONS

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION: PLAINTIFFS' FAILURE TO WARN CLAIMS, LIKE THE UNDERLYING DEFECT CLAIMS, ARE PREEMPTED

Three undisputable points mandate that Plaintiffs' additional irrelevant material, including reassertion of preempted claims must be stricken:

1. This Court has already determined that any defect claim based upon MC's use of a 2-point safety belt, instead of a 3-point belt, are preempted;

2. A failure to warn claim cannot be based upon a preempted claim;

3. As Plaintiffs admit by their pleadings, their failure to warn claim is based on the same claim of defect – the use of the 2-point belt – that the Court has already found preempted.

Plaintiff *again* alleges causes of action based upon the fact that the subject MPV contains a lap belt only (and not a 3-point belt) as authorized by Federal Motor Vehicle Safety Standards ("FMVSS") 208 instead of a lap/shoulder belt. The Court specifically, ruled that these claims are preempted under *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861. Further, despite the fact that this Court only granted Plaintiffs leave to amend to "flush out" their other (non lap belt-related) grounds to asserting liability bases of liability, and to assert a failure to warn claim, Plaintiffs instead have *added* a whopping 17 paragraphs which address the lap belt only claims. Further, plaintiffs have alleged causes of action based upon defendants' failure to warn of the dangers associated with the use of lap-belt only restraint systems. These improper and irrelevant matters should be stricken.

2. ARGUMENT

A. THE THIRD AMENDED COMPLAINT CONFLICTS WITH THIS COURT'S PRIOR RULING.

After lengthy briefing and argument by both parties, the Court clearly granted Defendants' Motion for Judgment on the Pleadings, rejecting claims based

on MC's election of the option to use 2-point safety belts. The Plaintiffs, however, have again pleaded, and in fact expounded upon, those claims in their Third Amended Complaint. See July 6, 2006 Reporter's Transcript, attached as Exhibit "A" to the Declaration of Julian Senior which accompanies Defendants' Demurrers).[1]

At the July 6 hearing, the Court made its position clear:

> THE COURT: THEN ADDRESSING THE PREEMPTION ARGUMENT HAVING TO DO WITH ANY INJURY THAT WOULD HAVE ARISEN BECAUSE THEY HAD LAP BELT ONLY SEATS AS OPPOSED TO THE LAP BELT AND SHOULDER SEATS, I BELIEVE THE MOVING PARTY IS CORRECT IN THAT REGARD.
>
> IT APPEARS TO ME THAT FEDERAL LAW AND FEDERAL POLICY DEVELOPED IN ALL THESE ARGUMENTS ABOUT THE PLAN THE DEPARTMENT OF THE TRANSPORTATION HAD FOR PHASING IN PASSENGER RESTRAINTS, *WOULD PRECLUDE A STATE COURT TORT ACTION THAT WOULD HAVE SUBSTANTIAL IMPACT ON THE FEDERAL SCHEME.*

RT at 9:14-24-10:1 (emphasis added.)

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[1] Defendants are unaware whether this Court has signed the order granting judgment in favor of MC.

The Court also made the limited scope of its leave to amend clear:

> THE COURT: SO THOSE THEORIES OF LIABILITY AS TO – FOR THE DECEDENT'S DEATH WOULD SURVIVE, DOESN'T SURVIVE AS TO THE LAP-BELT CLAIM.
>
> . . .
>
> SO MY INCLINATION IS TO GRANT THEM LEAVE TO FILED A THIRD AMENDED COMPLAINT, WHICH I UNDERSTAND MAYBE DOESN'T ADD NEW THEORIES, IT IS JUST MORE OR LESS FLUSHING OUT THE IDEA THAT THERE WERE OTHER SIMULTANEOUSLY – SIMULTANEOUS CAUSES OR BASIS OF LIABILITY TO THE DECEDENT'S DEATH.

RT 10:8-10, 18-23.

The Court also noted its skepticism of Plaintiffs' claimed ability to state a viable a failure to warn claim:

> MR. SHAYESETH: THAT IS NOT THE THEORY, YOUR HONOR. THE THEORY IS THEY FAILED TO WARN ABOUT THE DANGERS OF A LAP-ONLY BELT. SO IT IS NOT THAT THEY'RE FAILING TO WARN THAT YOU COULD HAVE A THREE-POINT, YOU COULD HAVE THIS, THAT IS NOT WHAT WE'RE TALKING ABOUT. THAT IS –

. . .

> IT SEEMS TO ME THE THEORY WOULD BE THE SAME, THE SAME PREEMPTION THEORY. THAT IS THE DEPARTMENT OF TRANSPORTATION HAS SET UP THIS PHASE-IN SCHEME THAT THEY HAD BASED ON THEIR PRIOR HISTORY OF TRYING TO COMPEL SOME KIND OF RESTRAINT. AND, SO, A FAILURE TO WARN CAUSE OF ACTION WOULD INTERFERE WITH THAT SCHEME.

RT 12:10-14; 13:13-18.

Despite this clear ruling by the Court, Plaintiffs have improperly added 17 paragraphs to the Third Amended Complaint which only deal with the lap-belt claim and asserted a failure to warn claim based on the alleged "defect" of a lap-belt only claim.

B. PLAINTIFF LACKED PERMISSION TO FILE THE CLAIMS ASSERTED IN THE THIRD AMENDED COMPLAINT.

When a trial court grants leave to amend, the scope of the permissible amendment generally is limited to the cause of action to which the demurrer was sustained with leave to amend. *See People v.* Clausen (1967) 248 Cal.App.2d 770, 785-86; *See also* Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), section 7:148.1a, p. 7-55. In this matter, the Court granted MC's motion for judgment on the pleadings "to the extent of that

theory of liability of the lap only seat belt." The Court gave plaintiffs leave to amend which would involve a failure to warn claim or "more or less flushing out the idea that there were other . . . simultaneous causes or [bases] of liability to the decedent's death." (RT at 10).

Instead of "flushing out" plaintiffs' other causes of Mrs. Williamson's death, or asserting the independent failure to warn claim, Plaintiffs have added 17 new paragraphs which go to the barred lap belt only claims. Plaintiffs are improperly and nakedly reasserting their barred claims. This Court did not grant plaintiffs leave to replead the lap belt only claims. As such, these new allegations should be stricken.

C. AS PLAINTIFFS ADMIT, ALL OF THEIR CLAIMS RELATING TO THE DEATH OF THANH WILLIAMSON RISE, AND HERE MUST FALL, WITH THE ALREADY BARRED LAP BELT ONLY CLAIMS.

In paragraph 29(a) of their TAC, Plaintiffs assert as follows:

> The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from "jackknifing" around the lap-only belt,

> and it was anchored at an unsafe angle to the SUBJECT VEHICLE.

To remove *any* doubt that they claim Thanh Williamson's death arises from the lap-only belt, Plaintiffs assert that *all* of their claims – relating to Thanh Williamson – *are* based on that claim:

> The defects and failures alleged in paragraphs 29 and 30 above were joint and concurrent causes of Plaintiffs injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together.

(TAC ¶ 31).

As MC understands it, Plaintiffs claim that none of Thanh Williamson's injuries would have occurred but for the "defect" of the MPV being equipped with the lap-only belt in the rear center seat. But this Court already determined that the option granted by NHTSA – use of a lap-only belt in the rear center seat – cannot be the basis of a defect. It is a preempted claim. Thus, by *Plaintiffs' own definitions*, all other claims relating to the death of Thanh Williamson are preempted.

D. PLAINTIFFS' FAILURE TO WARN CLAIM ABOUT THE LAP ONLY BELT IS PREEMPTED.

Just like Plaintiffs' assertions that MC should have used a 3-point belt in Mrs. Williamson's seating position rather than selecting the other option (a

2-point belt), Plaintiffs' failure to warn claims are preempted by FMVSS 208. At the hearing on MC's Motion for Judgment on the Pleadings, Plaintiffs cited *Carlin v. Superior Court* (1996) 13 Cal.4th 1104 and *Persons v. Salomon North America, Inc.* (1990) 217 Cap.App.3d 168 as holding that a failure to warn claim is protected from preemption. Defendants anticipate that Plaintiffs will make the same arguments in response to Defendants' Motion to Strike and Demurrers. But these cases provide no support for Plaintiffs' position.

Carlin involved an alleged failure to warn by Upjohn concerning the prescription drug Halcion. *Id.* at 1109. Although Upjohn apparently made a claim that a failure to warn theory was "inconsistent with federal regulatory policy," the court rejected that general proposition.

But Upjohn did not show, as Defendants have shown here, that it was being sued for its choosing one of two options offered by a federal regulatory agency. Here, one must remember that Plaintiffs assert Defendants' liability based upon MC's decision to use a 2-point belt, which was one of the options provided to it, as opposed to taking the other option (a 3-point belt). Nowhere in the *Carlin* opinion does it indicate that Upjohn, when labeling Halcion, had two options, chose one, and that the Plaintiff asserted liability on a claim that Upjohn should have chosen the other option. Thus, *Carlin is* simply inapposite to this matter.

Similarly, *Persons v. Salomon North America* is of no assistance. Plaintiff suffered injuries in a skiing accident, which occurred while she was wearing rented skis equipped with Salomon ski bindings and while wearing untreated thermal plastic boots. Id. at 170-171. Plaintiff claimed that the Salomon bindings were not compatible with that type of boot, and that she should have been so warned. *Persons* did not involve any preemption issue, nor the choice of any federally-provided options on which plaintiff based liability. Indeed, the Court of Appeal *affirmed* the judgment in favor of the *defendant* that it did not need to provide a warning directly to the consumer. *Persons* has no conceivable application to this case.

Those cases that do address similar facts hold that, since MC cannot be liable for selecting one of the two options available to it, there cannot be a duty to warn of any "danger" from its selection of that option. *See James v. Mazda Motor Corp.* (11th Cir. 2000) 222 F.3d 1323, 1324-27 (FMVSS 208 preempted claim that Mazda "failed to warn consumers that the [vehicle] was dangerous unless the manual lap belt was worn" in automatic shoulder/manual lap belt system); *Irving v. Mazda Motor* Corp. (11th Cir. 1998) 136 F.3d 764, 766, 770 (FMVSS 208 preempted claim that Mazda did not adequately warn of "the risks of not utilizing all portions – particularly the manual lap belt portion – of the safety belt system"); *Moser v. Ford Motor Co.,* 28 Fed. Appx. 168, 170, 172, 2001 WL 1387600 (4th Cir. 2001) (FMVSS 208 preempted claim that "Ford's warning to occupants to use the lap

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Moser and *Osman* both made it clear that, if the underlying defect allegation is preempted, so is a failure to warn claim. As the *Moser* court put it, the plaintiffs "inadequate warning theory is, at bottom, based on a claim that the [Camry's] two-point passive system was unsafe without the use of the lap belt. . . . [T]hat claim is preempted by the FMVSS under Geier. Because we are precluded in this case from finding any duty on [Toyota's] part to provide the manual lap belt, [Toyota] can have no corresponding duty to warn occupants to use the lap belt." 28 Fed. Appx. at 172. *Osman* specifically stated the manufacturer's selection of a NHTSA option forecloses both a defect claim and a derivative failure to warn claim, because the latter, just like the defect claim, "would effectively foreclose use of the option that [Toyota] certified the restraint system under because that option does not require the use of a manual lap belt." *Osman, supra,* 833 N.E.2d at 1021.

In *Carrasquilla, supra,* the court found that plaintiffs' inadequate warnings claims failed:

> [P]laintiffs' warnings claims are preempted to the extent that they challenged defendants' restraint options choice under FMVSS 208. Specifically, plaintiffs' claim that inadequate warnings regarding the shoulder-only automatic belts employed by defendants pursuant to federal regulations constitute a design defect is preempted.

Carrasquilla, 166 F. Supp.2d at 180; accord, *Irving, supra,* 136 F.3d at 770 ("Because Plaintiffs defective-design claim is preempted by FMVSS 208, there was no defect about which to warn. Plaintiffs failure-to-warn claim – which is, in this case, dependent on the preempted defective-design claim – was properly dismissed.")

As set forth previously in this case and below in the Memorandum, the courts which have interpreted *Geier* unanimously agree that FMVSS allows several choices of seat belts. If a plaintiffs lawsuit "would foreclose an option specifically permitted by FMVSS 208," that lawsuit conflicts with the federal law and is therefore preempted. *Griffith, supra* 303 F.3d at 1282. As this Court has previously recognized, FMVSS 208 had the purpose of encouraging automobile manufacturers to use one of several different seat belt design options. Plaintiffs now suggest that any manufacturer who sold a vehicle with the federally mandated option of a 2-point restraint in the rear, center seat must accompany the sale of the vehicle with some sort of "warning" that the subject vehicle was "defective, uncrashworthy and unsafe."

(TAC ¶ 45). This requirement interferes with the purposes of FMVSS 208.

It is clear that Plaintiffs' failure to warn theory, if countenanced by this Court, would present the same conflict with the language and purposes behind FMVSS 208 as a defective design claim. Therefore, a failure to warn claim, which does nothing more than penalize a federally-granted option, violates the holding of *Geier*. As this Court noted, Plaintiffs want manufacturers to tell customers that use of the federally-mandated restraint system renders the vehicle dangerous. Accordingly, Plaintiffs' failure to warn claim, as it is based upon the use of the lap-belt only, is preempted.

E. THE LAP BELT ONLY ALLEGATIONS ARE PRE-EMPTED BY FEDERAL LAW.

As this Court already ruled, in *Geier v. American Honda Motor Co., Inc.* and its progeny, FMVSS 208 preempts claims, like plaintiffs' here, that would take away FMVSS 208's choice between a lap belt or a lap/shoulder combination. For example, in *Hurley v. Motor Coach Indus., Inc.* (7th Cir. 2000) 222 F.3d 377, *cert. den.* (2001) 531 U.S. 1148, a bus driver argued that his bus was defectively designed because it provided only a two-point lap belt. *Id* at 378, 381. Plaintiff claimed, *inter alia*, that defendant should have installed a three-point belt. *Id.* at 380-81. The

Seventh Circuit held that FMVSS 208 and *Geier* preempted the suit:

> NHTSA's decision to leave the manufacturers . . . with the option of using a two point seat belt that met regulatory standards is quite understandable as a way of promoting safety by encouraging drivers to use the safety equipment that manufacturers install. But [plaintiffs] proposal unequivocally requires a three point seat belt, a requirement that could reduce utilization and thereby undermine FMVSS 208's safety objectives. . . . The point is that, as in *Geier*, the decision to leave options open to bus manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective and is therefore preempted.

Id. at 382. Thus, the court continued, "*Geier* confirms . . . that a state lawsuit that forecloses an option left open by FMVSS 208 is in fact preempted." *Id.* "We conclude that the Supreme Court's opinion in *Geier* governs Hurley's case and compels the conclusion that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suits that depends on foreclosing one or more those options is preempted." *Id.* at 383.

Similarly, *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, *cert. den.* (2003) 538 U.S. 1023, held that *Geier* and FMVSS 208 preempted a claim that would impose liability for using a two-point belt rather than a three-point belt. FMVSS 208

allowed GM the option to install either a two-point lap belt or a three-point lap/shoulder belt for plaintiffs seating position. *Id.* at 1278. GM had chosen the lap belt. *Id.* Plaintiffs claimed that the vehicle was "defective because of the lap belt only design" for plaintiffs position. *Id.* at 1278-79. The Eleventh Circuit held that the claim was preempted because it would take away the FMVSS 208 option to use a lap-only belt, and require the manufacturer to use the lap/shoulder combination belt instead. FMVSS 208 "does not mandate any particular type of restraint, but rather requires manufacturers to choose from several specific options in installing a restraint system in their passenger cars and trucks." *Id.* at 1279. Under FMVSS 208, General Motors was "free to install . . . either a lap belt for pelvic restraint or a shoulder/lap belt combination system." *Id.* "If successful, [plaintiffs] suit would foreclose an option specifically permitted by FMVSS 208. Therefore, it conflicts with that federal law and is impliedly preempted." *Id.* at 1282.

Still again, the Massachusetts Court of Appeals held that FMVSS 208 preempted based on failure to use a lap/shoulder belt combination in *Heinricher v. Volvo Car Corp.* (Mass. App. 2004) 809 N.E.2d 1094. Plaintiff there was "wearing a two-point lap belt" and riding in the rear seat of a Volvo sedan. *Id.* at 1095. The plaintiff sued in negligence and breach of warranty, asserting that the vehicle "was defective because it lacked a three-point lap-shoulder harness in the rear center seat" that he occupied. *Id.*

Following *Geier*, *Griffith*, and *Hurley*, the court held that FMVSS 208 "plainly provided Volvo . . . with the option of installing *either* a two-point lap belt *or* a three-point lap-shoulder harness in the rear center seat of its vehicles." *Id.* at 1098. Plaintiffs' action "would hold the defendants liable for choosing one Federally-approved passenger restraint system over another." *Id.* That "would conflict with and stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in Standard 208," so plaintiffs' claims "are preempted as a matter of law." 809 N.E.2d at 1098.

This case is the same. FMVSS 208 granted MC the option to use a lap-only belt or a lap/shoulder belt combination. Mazda chose to use the lap-only belt. Plaintiff seeks to impose a duty to use the lap/shoulder belt. That is the exact claim held preempted by *Hurley, Griffith* and *Heinricher,* and takes away the federally-granted option just as *in Geier.* It is accordingly preempted.

3. CONCLUSION

Based on the foregoing, MC and MNAO respectively request that this Court grant their Motion to Strike without leave to amend.

Dated: August 22, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
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MAZDA MOTOR CORPORATION and
MAZDA MOTOR OF AMERICA, INC. dba MAZDA NORTH AMERICAN OPERATIONS

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation;	**CASE NO. 04CC06494** **Assigned:** **Hon. Michael Brenner** **Department: C20** **DEFENDANTS MAZDA MOTOR CORPORATION AND MAZDA MOTOR OF AMERICA, dba MAZDA NORTH AMERICAN OPERATIONS' NOTICE OF DEMURRER AND DEMURRER TO**

FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**PLAINTIFFS' THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JULIAN G. SENIOR; [PROPOSED] ORDER** **Date: 9/19/06** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 8/07/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

PLEASE TAKE NOTICE that, on September 19, 2006 at 1:30 p.m. or as soon thereafter as the matter may be heard, in Department "C20" of the above-referenced Court, located at 700 Civic Center Drive West, Santa Ana, California, Defendant Mazda Motor Corporation ("MC") will and does hereby demur to Plaintiffs' Third Amended Complaint. Authority for this Motion is found both in California Code of Civil Procedure Section 430.10(e) and under the common law.

This motion is based upon the grounds that the causes of action set forth in plaintiffs' Third Amended Complaint fail to state sufficient facts to constitute a cause of action. Defendants' demurrer will be heard in conjunction with its motion to strike and is made pursuant to C.C.P. §§ 430.10 and 430.30 et seq.

This demurrer is based upon this Notice of Motion and Motion, Defendants' Motion to Strike and accompanying materials, the attached Memorandum of Points and Authorities, all matters of which the Court may take judicial notice, all other records and pleadings on file with the Court herein, including MC's Motion for Judgment on the Pleadings and the Court's ruling thereon, and upon such further oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: August 22, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendants
MAZDA MOTOR CORPORATION
and MAZDA MOTOR OF AMERICA,
INC. dba MAZDA NORTH AMERICAN
OPERATIONS

DEMURRERS TO THIRD AMENDED COMPLAINT

Defendants MC and MNAO respectfully demur to plaintiffs' Third Amended Complaint as follows:

FIRST CAUSE OF ACTION

MC and MNAO hereby demur to this cause of action on the grounds that it fails to state sufficient facts to constitute a cause of action. C.C.P. § 430.10(a).

SECOND CAUSE OF ACTION

MC and MNAO hereby demur to this cause of action on the grounds that it fails to state sufficient facts to constitute a cause of action. C.C.P. § 430.10(a).

THIRD CAUSE OF ACTION

MC and MNAO hereby demur to this cause of action on the grounds that it fails to state sufficient facts to constitute a cause of action. C.C.P. § 430.10(a).

FOURTH CAUSE OF ACTION

MC and MNAO hereby demur to this cause of action on the grounds that it fails to state sufficient facts to constitute a cause of action. C.C.P. § 430.10(a).

WITHOUT LEAVE TO AMEND

MC and MNAO request that leave to amend not be granted as amendment would be futile.

DATED: August 22, 2006

BOWMAN AND BROOKE LLP

By: /s/ [Illegible]
Brian Takahashi
Robert S. Robinson
Julian G. Senior
Attorneys for Defendants
MAZDA MOTOR CORPORATION
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OPERATIONS

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION: PLAINTIFFS' FAILURE TO WARN CLAIMS, LIKE THE UNDERLYING DEFECT CLAIMS, ARE PREEMPTED

Three undisputable points mandate that Plaintiffs' claims do not state a cause of action as a matter of law.

1. This Court has already determined that any defect claim based upon MC's use of a 2-point safety belt, instead of a 3-point belt, are preempted;

2. A failure to warn claim cannot be based upon a preempted claim;

3. As Plaintiffs admit by their pleadings, their failure to warn claim is based on the same claim of defect – the use of the 2-point belt – that the Court has already found preempted.

Plaintiff *again* alleges causes of action based upon the fact that the subject MPV contains a lap belt only (and not a 3-point belt) as authorized by Federal Motor Vehicle Safety Standards ("FMVSS") 208 instead of a lap/shoulder belt. The Court specifically ruled that these claims are preempted under *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861. Further, despite the fact that this Court only granted Plaintiffs leave to amend to "flush out" their other (non lap belt-related) grounds to asserting liability bases of liability, and to assert a failure to warn claim, Plaintiffs instead have *added* 17 paragraphs which address the lap belt only claims. Further, plaintiffs have alleged causes of action based upon defendants' failure to warn of the dangers associated with the use of lap-belt only restraint systems. This Court should sustain Defendants' demurrer as to all those causes of action as they relate to the death of Thanh Williamson.

2. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Delbert Williamson and Alexa Williamson allege that on August 14, 2002, they and the decedent Thanh Williamson were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed

the center divider line of a Utah highway, after the Jeep detached from a motor home being driven by Jack W. Bonzelaar. Third Amended Complaint ("TAC"), ¶ 1.

Plaintiffs alleged that they and Thanh Williamson were all wearing seat belts. Further, they claim that Thanh Williamson "was killed when the forces generated by this collision . . . caused her body to 'jackknife' around her defective lap belt, causing severe abdominal injuries and internal bleeding." TAC, ¶ 2.

Plaintiffs initiated this case on June 7, 2004 and filed a Second Amended Complaint ("SAC") on or about June 27, 2005. MC filed a Motion for Judgment on the Pleadings as to plaintiffs' lap-belt only claims in the SAC which was heard on July 6, 2006. At the hearing on MC's motion, this Court granted judgment against plaintiffs on their claims based upon the fact the subject vehicle had a lap-belt only seat belt in Mrs. Williamson's seating position as opposed to a lap/shoulder belt. The Court granted plaintiffs leave to file a Third Amended Complaint but only to the extent it would flush out plaintiffs' other claims. Plaintiffs filed their Third Amended Complaint; however, in contrast to this Court's directive, plaintiffs *added* 17 new paragraph's relating to the lap-belt only issue. Further, plaintiffs have now asserted all the claims based upon Mrs. Williamson's death are inextricably tied to the lap-belt only claims. As such, this demurrer should be sustained.

3. ARGUMENT

A. THE THIRD AMENDED COMPLAINT CONFLICTS WITH THIS COURT'S PRIOR RULING.

After lengthy briefing and argument by both parties, the Court clearly granted Defendants' Motion for Judgment on the Pleadings, rejecting claims based on MC's election of the option to use 2-point safety belts. The Plaintiffs, however, have again pleaded, and in fact expounded upon, those claims in their Third Amended Complaint. (See July 6, 2006 Reporter's Transcript, attached as Exhibit "A" to the Declaration of Julian Senior which accompanies Defendants' Demurrers).[1]

At the July 6 hearing, the Court made its position clear that it was granting the motion to judgment on the pleadings as to all of plaintiffs' claims based upon the use of a lap belt only system in the subject vehicle. The Court allowed plaintiffs to "flush out" other defect allegations which relate to Mrs. Williamson's death.

(See Discussion in Defendants' Motion to Strike and accompanying materials).

Despite the clear ruling by the Court, Plaintiffs have improperly added 17 paragraphs to the Third Amended Complaint which only deal with the lap-belt

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[1] Defendants are unaware whether this Court has signed the order granting judgment in favor of MC.

claim and asserted a failure to warn claim based on the alleged "defect" of a lap-belt only claim.

B. PLAINTIFF LACKED PERMISSION TO FILE THE CLAIMS ASSERTED IN THE THIRD AMENDED COMPLAINT.

When a trial court grants leave to amend, the scope of the permissible amendment generally is limited to the cause of action to which the demurrer was sustained with leave to, amend. *See People v. Clausen* (1967) 248 Cal.App.2d 770, 785-86; *See also* Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), section 7:148.1a, p. 7-55. In this matter, the Court granted MC's motion for judgment on the pleadings "to the extent of that theory of liability of the lap only seat belt." The Court gave plaintiffs leave to amend which would involve a failure to warn claim or "more or less flushing out the idea that there were other . . . simultaneous causes or [bases] of liability to the decedent's death." (RT at 10).

Instead of "flushing out" plaintiffs' other causes of Mrs. Williamson's death, or asserting the independent failure to warn claim, Plaintiffs have added 17 new paragraphs which go to the barred lap belt only claims. Plaintiffs are improperly and nakedly reasserting their barred claims. This Court did not grant plaintiffs leave to replead the lap belt only claims, and the Court has already granted judgment on the pleadings in this issue.

C. AS PLAINTIFFS ADMIT, ALL OF THEIR CLAIMS RELATING TO THE DEATH OF THANH WILLIAMSON RISE, AND HERE MUST FALL, WITH THE ALREADY BARRED LAP BELT ONLY CLAIMS.

In paragraph 29(a) of their TAC, Plaintiffs assert as follows:

> The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from "jackknifing" around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE.

To remove *any* doubt that they claim Thanh Williamson's death arises from the lap-only belt, Plaintiffs assert that *all* of their claims – relating to Thanh Williamson – *are* based on that claim:

> The defects and failures alleged in paragraphs 29 and 30 above were joint and concurrent causes of Plaintiff's injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together.

(TAC 31).

As MC understands it, Plaintiffs claim that none of Thanh Williamson's injuries would have occurred

but for the "defect" of the MPV being equipped with the lap-only belt in the rear center seat. But this Court already determined that the option granted by NHTSA – use of a lap-only belt in the rear center seat – cannot be the basis of a defect. It is a preempted claim. Thus, by *Plaintiffs' own definitions*, all other claims relating to the death of Thanh Williamson are preempted.

D. PLAINTIFFS' FAILURE TO WARN CLAIM ABOUT THE LAP ONLY BELT IS PRE-EMPTED.

Just like Plaintiffs' assertions that MC should have used a 3-point belt in Mrs. Williamson's seating position rather than selecting the other option (a 2-point belt), Plaintiffs' failure to warn. claims are preempted by FMVSS 208. At the hearing on MC's Motion for Judgment on the Pleadings, Plaintiffs cited *Carlin v. Superior Court* (1996) 13 Cal.4th 1104 and *Persons v. Salomon North America, Inc.* (1990) 217 Cap.App.3d 168 as holding that a failure to warn claim is protected from preemption. Defendants anticipate that Plaintiffs will make the same arguments in response to Defendants' Motion to Strike and Demurrers. These cases provide no support for Plaintiffs' position.

Carlin involved an alleged failure to warn by Upjohn concerning the prescription drug Halcion. *Id.* at 1109. Although Upjohn apparently made a claim that a failure to warn theory was "inconsistent with

federal regulatory policy," the court rejected that general proposition.

But Upjohn did not show, as Defendants have shown here, that it was being sued for its choosing one of two options offered by a federal regulatory agency. Here, one must remember that Plaintiffs assert Defendants' liability based upon MC's decision to use a 2-point belt, which was one of the options provided to it, as opposed to taking the other option (a 3-point belt). Nowhere in the *Carlin* opinion does it indicate that Upjohn, when labeling Halcion, had two options, chose one, and that the Plaintiff asserted liability on a claim that Upjohn should have chosen the other option. Thus, *Carlin* is simply inapposite to this matter.

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based on a claim that the [Camry's] two-point passive system was unsafe without the use of the lap belt. . . . [T]hat claim is preempted by the FMVSS under *Geier*. Because we are precluded in this case from finding any duty on [Toyota's] part to provide the manual lap belt, [Toyota] can have no corresponding duty to warn occupants to use the lap belt." 28 Fed. Appx. at 172. *Osman* specifically stated the manufacturer's selection of a NHTSA option forecloses both a defect claim and a derivative failure to warn claim, because the latter, just like the defect claim, "would effectively foreclose use of the option that [Toyota] certified the restraint system under because that option does not require the use of a manual lap belt." *Osman, supra*, 833 N.E.2d at 1021.

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Carrasquilla, 166 F. Supp.2d at 180; *accord, Irving, supra*, 136 F.3d at 770 ("Because Plaintiff's defective-design claim is preempted by FMVSS 208, there was no defect about which to warn. Plaintiff's failure-to-warn claim – which is, in this case, dependent on the

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It is clear that Plaintiffs' failure to warn theory, if countenanced by this Court, would present the same conflict with the language and purposes behind FMVSS 208 as a defective design claim. Therefore, a failure to warn claim, which does nothing more than penalize a federally-granted option, violates the holding of *Geier*. As this Court noted, Plaintiffs want manufacturers to tell customers that use of the federally-mandated restraint system renders the vehicle dangerous. Accordingly, Plaintiffs' failure to warn claim, as it is based upon the use of the lap-belt

only, is preempted and this demurrer must be sustained.

E. THE LAP BELT ONLY ALLEGATIONS ARE PRE-EMPTED BY FEDERAL LAW.

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Similarly, *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, *cert. den.* (2003) 538 U.S. 1023, held that *Geier* and FMVSS 208 preempted a claim that would impose liability for using a two-point belt rather than a three-point belt. FMVSS 208 allowed GM the option to install either a two-point lap belt or a three-point lap/shoulder belt for plaintiffs seating position. *Id.* at 1278. GM had chosen the lap belt. *Id.* Plaintiffs claimed that the vehicle was "defective because of the lap belt only design" for plaintiffs position. *Id.* at 1278-79. The Eleventh Circuit held that the claim was preempted because it would take away the FMVSS 208 option to use a lap-only belt, and require the manufacturer to use the lap/shoulder combination belt instead. FMVSS 208 "does not mandate any particular type of restraint, but rather requires manufacturers to choose from several specific options in installing a restraint system in their passenger cars and trucks." *Id.* at 1279. Under FMVSS 208, General Motors was

"free to install . . . either a lap belt for pelvic restraint or a shoulder/lap belt combination system." Id. "If successful, [plaintiff's] suit would foreclose an option specifically permitted by FMVSS 208. Therefore, it conflicts with that federal law and is impliedly preempted." *Id.* at 1282.

Still again, the Massachusetts Court of Appeals held that FMVSS 208 preempted based on failure to use a lap/shoulder belt combination in *Heinricher v. Volvo Car Corp.* (Mass. App. 2004) 809 N.E.2d 1094. Plaintiff there was "wearing a two-point lap belt" and riding in the rear seat of a Volvo sedan. *Id.* at 1095. The plaintiff sued in negligence and breach of warranty, asserting that the vehicle "was defective because it lacked a three-point lap-shoulder harness in the rear center seat" that he occupied. *Id.* Following *Geier*, *Griffith*, and *Hurley*, the court held that FMVSS 208 "plainly provided Volvo . . . with the option of installing *either* a two-point lap belt *or* a three-point lap-shoulder harness in the rear center seat of its vehicles." *Id.* at 1098. Plaintiffs' action "would hold the defendants liable for choosing one Federally-approved passenger restraint system over another." *Id.* That "would conflict with and stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in Standard 208," so plaintiffs' claims "are preempted as a matter of law." 809 N.E.2d at 1098.

This case is the same. FMVSS 208 granted MC the option to use a lap-only belt or a lap/shoulder belt combination. Mazda chose to use the lap-only belt.

Plaintiff seeks to impose a duty to use the lap/shoulder belt. That is the exact claim held preempted by *Hurley*, *Griffith* and *Heinricher*, and takes away the federally-granted option just as in *Geier*. It is accordingly preempted.

4. CONCLUSION

Based upon the foregoing and under the doctrine of preemption and this Court's prior ruling, this Court should sustain MC's and MNAO's Demurrer to the Third Amended Complaint as it relates to the claims arising out of the death of Thanh Williamson without leave to amend.

DATED: August 22, 2006

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson,

Plaintiffs,

vs.

MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive,

Defendants.

CASE NO. 04CC06494

Assigned:
Hon. Michael Brenner
Department: C20

[PROPOSED] ORDER RE MOTION TO STRIKE PORTIONS OF PLAINTIFF'S THIRD AMENDED COMPLAINT

Date: 9/19/06
Time: 1:30 p.m.
Dept.: C20

Action Filed:	**7/07/04**
Trial Date:	**8/07/06**
Motion Cutoff:	**7/23/06**
Discovery Cutoff:	**7/08/06**

GOOD CAUSE having been shown therefore, it is the order of this court that Defendants MAZDA MOTOR CORPORATION and MAZDA MOTOR OF AMERICA, INC. dba MAZDA NORTH AMERICAN OPERATIONS' Motion to Strike Portions of Plaintiffs' Third Amended Complaint is hereby approved.

IT IS SO ORDERED.

DATED: _____, 2006

_____
JUDGE OF THE
SUPERIOR COURT

[Proof Of Service And Service List
Omitted In Printing]

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD MOTOR COMPANY,	**CASE NO. 04CC06494** Hon. Michael Brenner (Dept. C-20) **PLAINTIFFS' OPPOSITION TO MAZDA MOTOR CORPORATION'S DEMURRER AND MOTION TO STRIKE THE THIRD AMENDED COMPLAINT** (Filed Sep. 13, 2006)

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, and DOES 1-100, inclusive, Defendants.	[Filed concurrently with Plaintiffs' Request for Judicial Notice] DATE: September 26, 2006 TIME: 1:30 P.M. DEPT.: C-20 Complaint filed: July 7, 2004 Trial date: November 7, 2006

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Mazda Motor Corporation's ("MAZDA") demurrer and motion to strike rest on a complete misunderstanding of the allegations of the Third Amended Complaint: MAZDA asserts that the design defect claims concerning the rear center seat's lap-only belt are identical to those alleged in the Second Amended Complaint and are therefore preempted by federal law based on the court's prior ruling. This is not accurate.

The Third Amended Complaint no longer relies on the allegation that MAZDA should have utilized a lap-shoulder belt rather than a lap-only belt, but now alleges that the vehicle's lap-only belt is itself defective "because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE." (TAC ¶ 29(a).) The Third Amended Complaint also alleges that Thanh Williamson's death was caused by *several defects* in the lap-only belt, seat bottom, seat back, and vehicle's structure (Third Amended Complaint ["TAC"] ¶ 29(a)-(d).) and asserts that these defects "were joint and concurrent causes of Plaintiff's injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together.." (TAC ¶ 31.)

These allegations concerning the design defects of the lap only belt and other components utilized in this particular vehicle cannot fall under the Court's prior order or be preempted by federal law because *they do not rest on MAZDA's failure to utilize the lap-shoulder seat belt* – they are independent claims arising out of MAZDA's failure to property [sic] design three separate features of the lap-only belt, as well as other components of the vehicle. No state or federal court has ever held that state common law claims attacking the design of a restraint system, rather than the manufacturer's choice of one restraint system over another, are preempted by federal law.

In addition, MAZDA contends that Plaintiffs' failure to warn claim concerning the lap-only belt is preempted because their design defect claims are preempted. As a matter of logic, since Plaintiffs' design defect claims are not preempted, their failure to warn claims cannot be preempted. Nevertheless, even if this Court were to find that Plaintiffs' design defect claims are preempted, their failure to warn claims still cannot be preempted because those claims are independent of their design defect claims. See *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1110-1113; *Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 699 (the jury "'must decide whether a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes "defective" simply by the absence of warning.'").

Accordingly, MAZDA's demurrer and motion to strike must be denied.

II. SUMMARY OF FACTS

On or about August 14, 2002, Plaintiffs Delbert Williamson, Alexa Williamson, and the decedent Thanh Williamson, represented through her Estate ("PLAINTIFFS"), were injured while they were traveling in their 1993 Mazda MPV Minivan when it was struck head-on by a 1998 Jeep Wrangler that had crossed the center divider line of a highway, after having become detached from a motor home being driven by Jack W. Bonzelaar. (Third Amended Complaint ["TAC"] ¶ 1.)

All passengers in the Williamsons' 1993 Mazda MPV Minivan wore seat belts. Thanh Williamson, however, was killed when the forces generated by this collision and the defective and uncrashworthy design of the MPV caused her body to "jackknife" around her defective lap belt, causing severe abdominal injuries and internal bleeding. Her husband and daughter, Delbert and Alexa Williamson, were also injured in the accident due to the defective and uncrashworthy design of the MPV. (TAC ¶ 2.)

The Third Amended Complaint alleges the following defects in the vehicle:

a. The center seating position of the middle bench seat was equipped with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions

because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from "jackknifing" around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE;

b. The angle, geometry, and composition of the seat bottom of the center and driver's side seating positions of the middle bench seat were inferior and unsafe in that they were unreasonably susceptible to ramping and submarining of passengers seated in those positions in frontal collisions;

c. The seat backs of the center and driver's side seating positions of the middle bench seat were inferior and unsafe in that they did not sufficiently withstand foreseeable forces in a frontal collision and folded forward causing Thanh and Alexa's upper torsos to further lean forward;

d. The entire vehicle did not contain sufficient energy-absorbing materials and structures to absorb reasonable amounts of force from a frontal collision, such that it was not reasonably crashworthy;

e. The front driver's side seating area lacked sufficient survival space, such that in a frontal collision, the driver's seat is dangerously compromised.

(TAC ¶ 29(a) (e).)

The Third Amended Complaint also alleges that MAZDA failed to adequately warn and instruct PLAINTIFFS and other consumers about the hazards, risks, and dangers of the above defects (TAC ¶ 30(a).) These defects and failures to warn were joint and concurrent causes of PLAINTIFFS' injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together. (TAC ¶ 31.) For example, the injuries to Thanh Williamson were the result of all of the defects alleged in paragraph 29, subsections (a)-(d), each defect acting in tandem to cause her severe abdominal injuries. (TAC ¶ 31.) But for the presence of all of these defects, Thanh Williamson's injuries would not have been as severe nor would she have died from her injuries. (TAC ¶ 31.)

III. MAZDA INCORRECTLY ASSERTS PLAINTIFFS DO NOT HAVE LEAVE TO ALLEGE THE CLAIMS ASSERTED IN THE THIRD AMENDED COMPLAINT BECAUSE PLAINTIFFS WERE GIVEN LEAVE TO ALLEGE OTHER BASES OF LIABILITY FOR THANH WILLIAMSON'S DEATH

In its motion to strike, MAZDA incorrectly contends that Plaintiffs "lack permission" to assert the claims alleged in the Third Amended Complaint. To the contrary, Plaintiffs were given leave to amend to allege *other bases of liability* for Thanh Williamson's death. As the Court stated:

> "So my inclination is to grant them leave to file a third amended complaint, which I understand maybe doesn't add new theories, it is just more or less flushing out the idea that there were *other* simulataneously [sic] – *simultaneous causes or basis of liability* to the decedent's death. So I am going to allow the filing of a third amended complaint."

Reporter's Transcript of July 6, 2006 Hearing, [Mazda Motion, Exhibit "A"], p. 10, lines 18-25 (emphasis added).

As discussed in detail below, Plaintiffs have alleged other bases of liability that are independent of MAZDA's failure to install a lap-shoulder belt in the rear center seat of the subject vehicle.

VI. PLAINTIFF'S CLAIMS REGARDING THE DEFECTS IN THE LAP-ONLY SEAT BELT, SEAT BOTTOM, SEAT BACK AND VEHICLE'S STRUCTURE ARE NOT SUBJECT TO FEDERAL PREEMPTION BECAUSE THEY DO NOT REST ON MAZDA'S FAILURE TO EMPLOY A LAP-SHOULDER SEAT BELT.

The Third Amended Complaint alleges that the subject vehicle was defective due to several defects in the lap-only belt, seat bottom, seat back, and vehicle's structure (TAC ¶ 29(a)-(d).) and asserts that these defects "were joint and concurrent causes of Plaintiff's injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be

evaluated and adjudicated together. For example, the injuries to Thanh Williamson were the result of all of the defects alleged in paragraph 29, subsections (a)-(d), each defect acting in tandem to cause her severe abdominal injuries." (TAC ¶ 31.)

Contrary to MAZDA's misunderstanding, Plaintiffs have not merely reasserted a "failure to utilize a lap-shoulder belt" claim, but are now alleging that the vehicle's lap-only belt is itself defective "because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap-only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE." (TAC ¶ 29(a).). These allegations concerning the design defects of the lap-only belt and other components utilized in this particular vehicle cannot fall under the Court's prior order or be preempted by federal law because *they do not rest on MAZDA's failure to utilize the lap-shoulder seat belt* – they are independent claims arising out of MAZDA's failure to property [sic] design three separate features of the lap-only belt, as well as other components of the vehicle. No state or federal jurisdiction has ever held that state common law claims attacking the design of a restraint system, rather than the manufacturer's choice of one restraint system over another, are preempted by federal law.

To hold otherwise would contravene the holding of the United States Supreme Court's decision in *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861 and its progeny. See *Geier, supra*, 529 U.S. at

885 ("It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption – say, because it would affect so few cars that its rule of law would not create a legal 'obstacle' to [FMVSS] 208's mixed-fleet, gradual objective."); *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51 (federal agency's decision to not require a particular safety feature based on economic considerations and the lack of a "universal" technical solution suitable for use on all vehicles does not have any preemptive effect.); *Carrasquilla v. Mazda Motor Corp.*, (M.D. Pa. 2001) 166 F.Supp.2d 169, 179 (plaintiff's claim relating to the manner in which Mazda implemented its design choice, specifically claims relating to Mazda's liability for not providing an adequate seat back, seat track, and knee bolsters, were not preempted); *Volkswagen of America, Inc. v. Gentry*, (Ga. App. 2002) 564 S.E.2d 733, 737 (plaintiffs' claims not preempted when plaintiffs' alleged that the passive restraint system chosen by manufacturer was defective in design). As the court in *Chevere v. Hyundai Motor Co.*, (N.Y.App. 2004) 774 N.Y.2d 6, 7, explained:

> "*Geier* does not automatically exempt automobile manufacturers from liability whenever a federal regulation provides them with options as to the type of restraint system to be employed. Nothing in [*Geier*] bars allegations of strict products liability, breach of warranty and negligence in a state action.

> *Geier* precludes actions alleging a general failure to equip a vehicle properly, but does not preclude common-law claims against a manufacturer who has unreasonably opted to meet only minimum performance requirements."

The claims asserted by Plaintiffs here, unlike those in *Geier*, would not require MAZDA to install an alternative restraint system that is optional under FMVSS 208, but merely requires MAZDA to ensure that the restraint systems it uses, in this case consisting of the lap-only belt, seat bottom, seat back, and vehicle's structure, are free of defects and safe for consumers. This difference is critical because *FMVSS 208 is a safety standard, not a design standard.* 49 U.S.C. 30101 (purpose of FMVSS are "(1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and (2) to carry out needed safety research and development."). To employ it as a design standard, as MAZDA urges, would immunize every automobile manufacturer from having to meet its common law duty of care to design a safe vehicle simply because an FMVSS gives them a choice of alternative safety devices. That would be directly contrary to the safety clause of the Federal Motor Vehicle Safety Act and the holdings in *Geier* and its progeny. See 15 U.S.C. § 1397(k) ("[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."); *Geier, supra,* 529 U.S. at 870 (savings clause evidences Congress' intent to "preserve"

common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor.").

In short, Plaintiffs' design defect claims are not preempted under *Geier* and its progeny because Plaintiffs are not attacking MAZDA's choice of a lap-only seat belt, but rather MAZDA's execution, implementation and design of the restraint systems utilized in the subject vehicle. See *King v. Ford Motor Company* (6th Cir. 2000) 209 F.3d 886, 892 (claims attacking the execution, implementation, and design of a passive restraint system are not preempted).

V. PLAINTIFFS' CLAIMS REGARDING THE DEFECTS IN THE LAP-ONLY SEAT BELT ARE EXPRESSLY EXEMPTED FROM PREEMPTION BY THE SAVINGS CLAUSE OF THE FEDERAL MOTOR VEHICLE SAFETY ACT.

A. Legal Standard Governing Federal Preemption.

As the U.S. Supreme Court has instructed, a party arguing for preemption of state law bears a heavy burden of overcoming the long-standing presumption that "Congress does not cavalierly preempt state-law causes of action." *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485. This burden is especially heavy where, as here, preemption would displace the historic power of the states to protect the health and safety of their citizens. *Id.* at 485. This presumption

applies equally to claims of express or implied preemption. *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 958, fn. 11. Where preemption of common-law claims would leave injured individuals without any state or federal remedy, which is the result sought by MAZDA here, a court may find preemption only in the most compelling circumstances. See *English v. General Electric Corp.*, 496 U.S. 72, 87-90; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)

B. Background of Federal Motor Vehicle Safety Standards

In 1996, Congress passed the National Traffic and Motor Vehicle Safety Act of 1996, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve that goal, Congress empowered the federal Department of Transportation to issue minimum safety standards for motor vehicle performance. See 15 U.S.C. §§ 1391(2), 1392(a). The Department, in turn, delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. NHTSA fulfilled its responsibility by promulgating the Federal Motor Vehicle Safety Standards ("FMVSS") published at 49 C.F.R. §§ 571.1-.302. The FMVSS are *minimum* standards that a vehicle must meet in order to be sold in the United States.

Most of the FMVSS are "performance" standards, which set forth how a vehicle must perform under certain circumstances. The most recognizable example of a performance standard is the crash testing section of FMVSS 208, which specifies the maximum injury criteria levels for crash test dummies in particular types of barrier impacts. The FMVSS also contain "design" standards, which dictate the parameters of how certain components are actually designed or placed in the vehicle. One example of a design standard is FMVSS 210, which dictates certain zones in which seat belt anchors must be installed.

The Safety Act also includes a "savings" clause that provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, the U.S. Supreme Court construed this clause as evidencing Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

C. The History of the Rear Center Seat Option of FMVSS 208.

At the time the MAZDA MPV at issue was manufactured, FMVSS permitted auto manufacturers to install either two-point lap belts (a "Type 1" system) or three-point lap/shoulder belts (a "Type 2" system)

in the rear-center seats of their cars. See 49 C.F.R. § 571.208 S.4.1.4.2. (1990). Since MAZDA's motion rests on this version of FMVSS 208, it is important to understand its evolution in some detail.

The relevant version of FMVSS 208 first took effect in 1968, when NHTSA passed its initial set of motor vehicle safety standards. See 32 Fed. Reg. 2408 (February 3, 1967). At that time, FMVSS 208 required the installation of lap/shoulder belts at the drivers' and right-front passengers' seating positions, and either lap belts or lap/shoulder belts at every other designated seating position (i.e. the center front seat and all rear seats). *Id.* at 2415. In the preamble accompanying the final rule, NHTSA characterized this rule as a "minimum safety standard" within the meaning of the Safety Act. 32 Fed. Reg. at 2408. The regulatory preamble contained no further explanation or statement of policy with respect to the agency's decision to give car makers the option of installing either lap belts or lap/shoulder belts in rear seating positions. *See id.*

In 1986, the National Transportation Safety Board ("NTSB") issued a Safety Recommendation with respect to lap/shoulder belts. (TAC ¶ 22.) Among other things, the NTSB concluded that "[l]ap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury. . . ." (TAC ¶ 22.) The NTSB further observed that "such systems appear to work effectively even for children, and they can be used with child safety seats and booster seats." (TAC ¶ 22.) The

NTSB ultimately recommended that, "[g]iven the known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems." (TAC ¶ 22.) With respect to the industry, the NTSB recommended that "early action . . . be taken to provide aftermarket retrofit assemblies to convert lap/only belts to lap/shoulder belts." (TAC ¶ 22.) The NTSB further found that such "retrofit assemblies" may be technically feasible "at very [sic] seating location," including rear-center seats. (TAC ¶ 22.) With respect to new cars, the NTSB recommended that all rear seats – including rear center seats – be equipped with lap-shoulder belts. (TAC ¶ 22.)

In 1988, NHTSA proposed to amend FMVSS 208 to require lap/shoulder belts in all rear outboard seating positions of passenger cars. See 53 Fed. Reg. 47982 (November 29, 1988). In its Notice of Proposed Rulemaking, NHTSA stated that it had decided not to propose a rear-center seat requirement based on manufacturers' complaints that the costs of installing lap/shoulder belts in rear-center seats might exceed the anticipated safety benefits. See *id.* at 47984. At no point did NHTSA state that lap/shoulder belts would be unsafe in rear-center seats, or that it affirmatively sought to give car makers the unfettered choice between installing lap belts or lap/shoulder belts in that seating position. To the contrary, it emphasized that

"[r]ear seat lap/shoulder belts are estimated to be more effective than rear seat lap belts in reducing fatalities and moderate-to-severe injuries." *Id.* at 47982.

In 1989, NHTSA published a final rule requiring lap/shoulder belts in all rear-outboard seats, but retaining the regulatory option with respect to rear-center seats. See 54 Fed. Reg. 25275 (June 14, 1989). The regulatory preamble once again emphasized that "NHTSA believes that lap/shoulder belts would be more effective than lap-only belts in rear seating positions." *Id.*

In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars. (TAC ¶ 25.) Among other things, the study compared the fatality risk for lap/shoulder belted occupants to the risk for lap-belted occupants. NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts [in rear outboard seats] *has significantly enhanced occupant protection, especially in frontal crashes.*" (TAC ¶ 25.) NHTSA added that:

> In all crashes, lap/shoulder belts are 15 percent more effective than lap belts alone. In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone. . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent.

(TAC ¶ 25.)

In December 2002, President Bush signed into law a bill known as "Anton's Law," which provides for the improvement of child safety devices when installed in motor vehicles. See Pub. Law No. 107-318. One of the provisions of Anton's Law concerns the installation of lap/shoulder belts in rear-center seating positions. Specifically, Section 5(a) of the law directs NHTSA to amend FMVSS 208 to require lap/shoulder belts in rear-center seats by no later than December 2004.

Compelled by this statutory directive, on August 2003, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (August 2, 2003). At the time, NHTSA stated that Anton's Law is "fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its notice of proposed rulemaking, NHTSA once again emphasized the special safety benefits of lap/shoulder belts for children, stating that "one of the primary reasons for today's proposal is the increased protection that children between the ages of four and eight gain by having a lap/shoulder belt made available in rear center seating positions. When these lap/shoulder belts are installed in the rear center seating position, there will be an additional, and potentially safer, seating position available for a child in a belt-positioning booster seats." *Id.* at 46548. NHTSA further emphasized that requiring lap/shoulder belts in rear-center seats would not just benefit children: [i]t would also benefit older occupants." *Id.*

D. Geier v. American Honda

Relying on *Geier v. American Honda Motor Co., Inc.* (2.000) 529 U.S. 861, MAZDA contends that all of PLAINTIFFS' claims arising out of the death of Thanh Williamson are preempted by federal law. *Geier,* however, is not applicable here.

Geier involved a "no airbag" claim. The plaintiff alleged that her injuries were exacerbated by the fact that her vehicle – a 1987 Honda Accord – lacked a driver's side airbag. *Id.* at 865. Plaintiff asserted that Honda had designed the car negligently and defectively by failing to equip the car with a driver's side airbag. *Id.*

Honda argued that this no airbag claim was preempted by the Safety Act, and in particular, FMVSS 208. Honda cited the portion of FMVSS 208 that required car manufacturers to "phase in" passive restraint requirements beginning in model year 1987. According to the court, there were two important prongs to this phase in requirement. First, the requirements allowed manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic seatbelts, etc. *Id.* at 878. Second, NHTSA implemented a gradual phase in of the passive restraints, requiring them on only 10 percent of 1987 models and increasing the percentage until it reached 100 percent for the 1990 model year. *Id.* at 879.

The court was also sensitive to some of NHTSA's concerns that led it to create the phase in scheme as

opposed to requiring a specific type of system on all cars. Those concerns included the fact that since passive restraints were relatively new to the marketplace, it was not known how the public would react to the various systems, and NHTSA wanted to allow manufacturers time to experiment with a variety of systems in order to find the best ones. *Id.* at 877-79. Honda argued that the plaintiff's no airbag claim conflicted with this passive restraint phase in scheme and was therefore preempted by. FMVSS 208.

First and most significantly, *the Supreme Court unanimously found that the Safety Act did not expressly preempt the plaintiff's claim. Id.* at 868. Honda had urged express preemption under the Safety Act's preemption provision. 15 U.S.C. § 1392(d). The Court, however, rejected this argument, relying on the Safety Act's "savings clause," which states: "Compliance with any [FMVSS] shall not exempt any person from any liability under common law." 15 U.S.C. § 1397(k), *Geier, supra,* 529 U.S. at 867-68. This language, the Court held, was specifically intended to "leav[e] adequate room for state tort law to operate – for example, where federal law creates only a floor, i.e., *a minimum safety standard." Id.* at 868 (emphasis added). Thus, under *Geier,* if a federal safety standard constitutes a floor or minimum standard, conflict preemption will ordinarily not apply because the Safety Act's savings clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by

a federal regulation intended to provide a floor." 529 U.S. at 871.

This holding is critical because it made clear that the vast majority of automotive defect cases are not preempted because most FMVSS's create "only a floor, i.e., a minimum safety standard." *Id.* at 868. This holding is consistent with the Supreme Court's subsequent interpretation of other federal statutes with similar preemption provisions. See *Bates v. Dow Agrosciences LLC,* (2005) 544 U.S. 431 (plaintiffs claims against manufacturer of pesticide are not preempted by the labeling provision of Federal Insecticide, Fungicide, and Rodenticide Act because of its savings clause); *Sprietsma v. Mercury Marine,* (2002) 537 U.S. 51 (plaintiff's state common law claims against manufacturer of outboard motors were neither expressly nor impliedly preempted the Federal Boat Safety Act because the savings clause of the FBSA specifically preserved liability under state common law).

In spite of the savings clause, a five-member majority of the Supreme Court decided to apply implied preemption principles to the Safety Act, and the FMVSS. *Geier, supra,* 529 U.S. at 874. The Court held that if a tort claim "actually conflicts" with the FMVSS, then it is preempted. *Id.* A claim actually conflicts when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 873. Applying these principles, the court found that the plaintiff's no

airbag claim actually conflicted with FMVSS 208. *Id.* at 874.

In short, the basis on which the Court found preemption was extremely narrow. Specifically, the Court found a conflict with FMVSS 208 based on the detailed NHTSA policy behind the passive restraint phase-in scheme. According to the Court, plaintiff's no airbag claim aimed at the 1987 Accord was the equivalent of requiring all 1987 model year vehicles to be equipped with an airbag. *Id.* at 881. The Court was concerned that such an "all airbag" rule in 1987 would have "presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* The Court had noted that NHTSA wanted this variety to "help develop data on comparative effectiveness" and to "facilitate the development of alternative, cheaper, and safer passive restraint systems." *Id.* at 862.

Thus, in all preemption motions relying on *Geier*, the focus must be on this narrow predicate of the court's ruling. The Court did not find that tort claims are preempted merely because there is a FMVSS covering the component at issue or providing options to manufacturers. The Court limited its holding to those cases where the claim would actually conflict with the stated purpose and goals of NHTSA.

E. The U.S. Government has consistently taken the position that simply because FMVSS 208 gives manufacturers the option of choosing different restraint systems does not mean that state common law claims are preempted.

Geier's holding and approach is in accordance with the consistent position of the United States that regulatory options do not, in and of themselves, exert preemptive effect. In *Geier,* the Supreme Court gave "special weight" to the position that NHTSA had taken "consistently over time" in a series of amicus briefs filed with the Court in three different cases – *Wood v. General Motors Corp.*, (1st Cir. 1988) 865 F.2d 395, *cert. denied,* (1990) 494 U.S. 1065; *Freightliner Corp. v. Myrick,* (1995) 514 U.S. 280; and *Geier, supra,* 529 U.S. at 883, 885. See Request for Judicial Notice, Exhibits "A", "B", and "C." In those very briefs, NHTSA specifically rejected the broad "options" argument advanced by MAZDA here.

Thus, in an Amicus Curiae Brief filed by the United States in opposition to the grant of *certiorari* in *Wood,* which presented the same question that the Court ultimately answered in *Geier,* the federal government stated:

> *Respondent argues that FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints. We disagree with this reasoning.* Nothing in the Safety Act or FMVSS 208 confers on car

> makers a "right" to comply with the federal standards without tort liability, and [the Safety Act's savings clause] proves that Congress did not grant any such immunity. *That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law.* Federal standards are "minimum standard[s]," 15 U.S.C. 1391 (2), permitting manufacturers to use any design that satisfies federal requirements. If any design "permitted" in this sense could not be the subject of a common-law design defect claim, manufacturers would obtain by implication what Congress expressly denied them in [the Safety Act's savings clause]: immunity from common law liability by complying with minimum federal standards. That result would be contrary to Congress's statutory design, which was to supplant direct state regulation of vehicle design, but to leave the common law intact absent an actual conflict with federal standards. *Thus, the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted.*

Request for Judicial Notice, Exhibit "A" at 7-8 (citations omitted; emphasis added).

Similarly, in the Amicus Curiae Brief of the United States in *Freightliner,* the federal government noted that, "[a]lthough the majority of courts to have considered the question have concluded that 'no-airbag' suits are preempted, they have done so on a broader theory of implied preemption *with which the United States does not agree,* i.e., that the existence of 'options' to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option." Request for Judicial Notice, Exhibit "B" at pp. 28-29 n.16 (emphasis added).

Finally, in the Amicus Curiae Brief of the United States in *Geier,* the federal government argued that "state tort law does not conflict with a federal 'minimum standard'. . . . merely because state law imposes a more stringent requirement." Request for Judicial Notice, Exhibit "C" at p. 21. Based on this argument, the United States went on to state:

> *We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose.* We disagree, however, with the contention that the Secretary provided options because she had no statutory authorization to do otherwise. The Secretary could have imposed performance requirements that effectively required an airbag design. As we explain at pages 23-26, *infra,* the Secretary chose not to do so in order to encourage the provision of a variety of passive restraints, because she

> determined that would best promote safety. Petitioners' claims are preempted because they would frustrate that policy judgment.

Id. at 21 n.18 (citations omitted; emphasis added). It was precisely this reasoning – i.e., that common-law no-airbag claims are preempted because they would "frustrate" NHTSA's special policy goals, *not* because Standard 208 created regulatory options – that the Supreme Court adopted in *Geier*. See *Geier, supra*, 529 U.S. at 883.

In short, the federal government itself has long been of the view that the mere existence of regulatory options is insufficient to preempt common-law claims. This view, moreover, is entitled to great deference from this Court. See *Geier, supra*, 529 U.S. at 883, 886 (federal government's position on the preemptive effect of Standard 208 is entitled to "special weight"); *Sprietsma, supra*, 537 U.S. at 68 (deferring to United States' view that decision by the United States Coast Guard not to require propeller guards on motor boat engines does not preempt common-law nopropeller-guard claims).

F. California and the Ninth Circuit have upheld the broad scope of the savings clause and have narrowly interpreted *Geier* against preemption.

There are currently no published California State or Ninth Circuit cases applying *Geier* to an automotive defect case. However, when *Geier* was before

the United States Supreme Court, the State of California, along with 16 other states, filed an Amicus Brief in which it clearly stated its position that (1) the savings clause of the Federal Motor Vehicle Safety Act is essentially an "anti-preemption provision" which excludes claims of design defect from federal preemption, (2) in light of the clear language of the savings clause, the Court should not apply implied conflict preemption, and (3) the purpose of the Safety Act is to prevent injury, whereas the purpose of state common law is to redress injury, so the Safety Act should not be interpreted to supercede the traditional role of state common law. See *Brief Amici Curiae of the States of Missouri, Arizona, California, etc. in Geier v. American Honda Motor Co.*, [Request for Judicial Notice, Exhibit "D"] at pp. 6, 12, 13, 16.

In addition, the Ninth Circuit and district courts have distinguished *Geier* in other contexts. Shortly after *Geier* was decided, the Ninth Circuit applied it in a non-auto context. In *Leipart v. Guardian Industries* (9th Cir. 2000) 234 F.3d 1063, the plaintiff alleged he was injured due to defects in a shower door that caused it to break into long, dangerous shards rather than into small, relatively harmless pieces. *Id.* at 1065-66. The defendant argued such claims were preempted by the federal Consumer Product Safety Act ("CPSA"). Like the auto Safety Act, the CPSA calls for the promulgation of standards similar to the FMVSS, and one of those standards specifically addresses the manner in which shower doors must break if subjected to a certain force. *Id.* at 1066. The

CPSA also contains an express preemption clause and savings clause almost identical to the auto Safety Act. *Id.* at 1066-67.

Like *Geier,* the *Leipart* court first held that the CPSA did not expressly preempt the plaintiff's claims. *Id.* at 1069. The court then went on to distinguish *Geier* and hold that the CPSA also did not impliedly preempt, the claims. *Id.* at 1069-70. In doing so, the court cited to the fact that *Geier* relied upon NHTSA's stated policies behind the phase-in provisions of FMVSS 208. *Id.* at 1069. The CPSA is different because it merely created a "floor" or minimum standard above which state law could impose further duties. *Id.* at 1070.

Similarly, in *Oxygenated Fuels Ass'n v. Davis,* 331 F.3d 665, 672 (9th Cir., 2003), the Ninth Circuit distinguished *Geier* in the context of a case implicating the Clean Air Act:

> "Geier is distinguishable from this case on two grounds. First, in Geier, the relevant regulating agency, in interpreting its own governing statute, had decided that the suit was preempted, and the Supreme Court gave deference to the agency's determination. See id. at 883-84. Here the EPA has made no such determination. Second, the Supreme Court in Geier found abundant evidence in the administrative history of the FMVSS to indicate that it was intended to give auto manufacturers a choice of safety restraints. See id. at 875-83. We can find no evidence

> that the Clean Air Act was intended to give gasoline producers a comparable choice of oxygenates. Indeed, we have already specifically held in Exxon Mobil that HN16the [sic] legislative history of the Clean Air Act does not support a conclusion that Congress meant to give gasoline producers an unconstrained choice of oxygenates. For these reasons, several courts have already rejected Geier-based preemption challenges to MTBE regulations."

The Northern District of California has also properly applied a narrow reading of *Geier* in two decisions denying motions to dismiss automobile class actions. See *Kent v. DaimlerChrysler Corp.* (N.D. Cal. 2002) 200 F.Supp.2d 1208, 1210; *Chamberlain v. Ford Motor Company,* (N.D. Cal. 2004) 314 F. Supp. 2d 953..

In *Kent,* the plaintiffs brought a class action alleging that certain model year Jeep Grand Cherokees have a design defect, which causes them to self-shift from park to reverse. *Kent, supra*, 200 F.Supp. at 1210. DaimlerChrysler argued that plaintiffs' claims were preempted by FMVSS 102, which addresses transmission issues. The court, citing *Geier,* rejected that argument. It noted the *Geier* court's reliance on the history of FMVSS 208 and NHTSA's stated desire to encourage a mix of passive restraipnt systems. *Kent, supra,* 200 F.Supp. at 1215. By contrast, the court found no such policy rationale in FMVSS 102. *Id.* at 1216.

Likewise, in *Chamberlain,* the court engaged in a proper interpretation of *Geier* and denied Ford's motion to dismiss a class action complaint. The court found that *Geier's* preemption holding was based on the history of FMVSS 208 and that "the Department of Transportation's carefully considered policy decision to allow gradual introduction of safety devices better to meet safety needs and accommodate manufacturers and the public." *Chamberlain, supra,* 314 F. Supp. 2d at 963. Like *Kent,* the court found no such "considered choice" at issue in that case. *Id.* ("*Geier* is distinguishable because there is no substantive regulation at issue in the instant case nor is there language in the MVSA or its legislative history demonstrating that exclusive federal agency administration of injunctive remedies in the field of motor vehicle safety was the considered policy choice of Congress.")

These decisions demonstrate that that [sic] the Ninth Circuit and California acknowledge the limited scope of *Geier.* These courts recognize that the FMVSS do not preempt state tort claims that simply hold the manufacturers to higher standards than the bare minimum required by the FMVSS.

G. PLAINTIFFS' claims regarding the lack of a three-point seat belt are not impliedly preempted by FMVSS 208.

PLAINTIFFS' seat belt claims are not preempted here simply because PLAINTIFFS seek to hold

MAZDA to a higher standard than the minimum standard set forth in FMVSS 208. See *Leipart, supra,* 234 F.3d at 1070. Examples of FMVSS that establish minimum performance standards are those dealing with roof crush (FMVSS 216) and seat back strength (FMVSS 207). Some published cases provide additional examples.

In *Harris v. Great Dane Trailers* (8th Cir. 2000) 234 F.3d 398, the plaintiff alleged inadequate reflective tape on the back of a truck. FMVSS 108 governs reflective devices on the back of trucks. The court found no preemption because FMVSS 108 only set a minimum standard. *Id.* at 401-02. The court also found that the lack of specific tape configuration requirements did not preempt the claim because it did not constitute a federally granted "option" like the standard at issue in *Geier.* Rather, it simply "left the industry where it was before – free to make voluntary decisions" about safety devices. *Id.* at 402-03.

The mere existence of options in FMVSS 208 does not mean that a claim based on the choice of one of those options is preempted. The government took this position in its amicus brief for *Geier* by stating that even though FMVSS 125 gave manufacturers multiple options for the design of reflective devices on stopped vehicles, NHTSA did not determine that the availability of these options was necessary to promote safety. U.S. Brief, 1999 WL 1045115, at *21-22. In other words, the "options" at issue in that case were part of a unique phase-in scheme that sought a mix of systems. Absent such a specific regulatory history

promoting the mix of options, preemption cannot apply.

This is the lesson of *Geier* itself (which relied on a highly unusual regulatory history as the basis for its preemption holding, *not* on the fact that the regulation created various options) and of the United States' own consistent litigating position that mere regulatory options do not, in and of themselves, exert any preemptive effect. If the mere existence of regulatory options were sufficient to preempt tort claims, then *Geier* would not have even needed to address the complex policy reasons underlying the 1984 version of FMVSS 208; it would have been sufficient to point out that the car maker in that case (Honda) had chosen to install one of several permitted regulatory options, and that the chosen option did not require an airbag. *Geier,* however, never purported to rely on such an observation, making clear that regulatory options, standing alone, do not exert any preemption force under the Safety Act.

Contrary to MAZDA's assertion, there is no basis for concluding that this lawsuit would undermine some special federal policy with respect to rear-center seats. This case is inapposite from *Geier,* which involved a version of FMVSS 208 that required car manufacturers to install either airbags or some other form of passive restraint in the front seats of passenger cars. The accompanying regulatory preamble made clear that the reason the federal government gave car makers the choice of installing

various types of passive restraints was to ensure that car manufacturers installed a mix of different devices in the front seats of cars, in part to avoid a massive public backlash against airbags. Given this fear of airbags, NHTSA had the specific goal of ensuring that some cars include forms of passive restrains *other than* airbags. *Geier* held that, in light of this unique goal, a jury verdict holding a manufacturer liable for its failure to install an airbag would undermine federal policy by pushing car makers to install airbags in all their cars.

This federal policy has no application here. In contrast to the hotly-debated airbag, the lap/shoulder belt has always been required equipment in the front seats of passenger cars (and since 1989, in the rear outboard seats). Given this history, there is no basis for concluding that NHTSA affirmatively sought to induce manufacturers to build some number of cars that did not include lap/shoulder harnesses in the rear-center seats. And the regulatory history of the options standard at issue does not contain *a single reference* to the type of "technological diversity" goals at issue in *Geier*.

Nor is there any merit to MAZDA's contention that the federal government's 1989 decision to not require lap/shoulder belts in rear-center seats would be undermined by this lawsuit. This decision was not based on any conclusion that lap/shoulder belts would be unsafe or undesirable in that seating position. To the contrary, NHTSA repeatedly stated that lap/shoulder belts were the safest form of seat belt

technology, and it affirmatively *required* lap/shoulder belts in all other seating positions. Instead, the agency's decision to not require lap/shoulder belts in rear-center seats was based on its concerns about the technical difficulties of requiring lap/shoulder belts in all cars and the economic burden such a universal rule would impose on car makers. The U.S. Supreme Court, however, has made it clear that *these sorts of concerns cannot form the basis for a finding of implied preemption.* See *Sprietsma, supra,* 537 U.S. 51.

II. The out-of-state federal cases relied upon by MAZDA have no precedential or persuasive authority here.

In addition to its erroneous reliance on *Geier,* MAZDA cites on a number of cases that do not support its position. MAZDA principally relies on *Griffith v. General Motors Corp.,* 303 F.3d 1276 (11th Cir. 2002), which found implied conflict preemption of the plaintiff's claim that General Motors was negligent for failing to provide a shoulder belt along with a lap belt in the front-center seat of a car. *Griffith,* however, is flawed at its core and should not be given any consideration by this Court.

First and foremost, *Griffith* was decided before the U.S. Supreme Court decided *Sprietsma,* 537 U.S. at 51. As explained above, *Sprietsma* makes clear that an agency's decision not to require a particular safety feature based on its view that the costs of a

universal regulatory requirement might exceed the safety benefits does not preempt common-law claims seeking to hold a manufacturer liable for not installing that safety feature in a particular vehicle. In light of *Sprietsma*, the decision in *Griffith* is clearly wrong.

Second, *Sprietsma* aside, *Griffith* lacks any persuasive authority because it rests on an erroneous factual assumption that renders the entire decision invalid: that the federal government's "technological diversity" goal applied to *both* manual seat belts and passive restraints. In its decision, the Third Circuit asserted that "DOT intended and expected FMVSS 208 to produce a mix of restraint devices, *both passive and manual,* in cars and trucks." 303 F.3d at 1281 (emphasis added). As support for this proposition, *Griffith* relies exclusively on the U.S. Supreme Court's decision in *Geier*. *See id.* (citing *Geier,* 529 U.S. at 879). However, as explained above, *Geier* merely discussed the federal government's technological diversity goal with reference to *passive* restraints, and the Supreme Court never suggested that NHTSA had similar goals with respect to manual restraints in the rear seats of vehicles. This is not surprising, given that MAZDA itself has failed to unearth any regulatory materials that even hint -- let alone demonstrate – that NHTSA ever intended to promote a diverse array of manual restraints in the rear-center seats of passenger cars. This core factual error strips *Griffith* of any even arguable validity.

Third, *Griffith* is distinguishable on its facts. *Griffith* involved claims that a pickup truck was defectively designed because its *front* center seat lacked a lap/shoulder belt. 303 F.3d at 1278. This is an entirely different issue than this case, which involves the *rear* center seat of a passenger car. The 1989 rulemaking that is the centerpiece of MAZDA's preemption argument here was not at issue in *Griffith*, because that rulemaking did not address the front seats of cars. Thus *Griffith* involved a different type of claim; a different options standard; and an entirely different regulatory history than this lawsuit – all reason enough to reject any reliance on the decision outright.

Hurley v. Motor Coach Inds., 222 F.3d 377 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001) is also inapposite. There, a bus driver sued a bus manufacturer for failing to do more than install a two-point lap belt in his seat, which was the minimum safety feature required by federal law. (The governing version of FVMSS 208 gave the manufacturer the option of installing either a full "passive" system or installing *either* a lap belt or a lap/shoulder belt.) With respect to the claim that the seat should have had a lap/shoulder belt, the Seventh Circuit focused on the fact that NHTSA had expressed concern that *heavy vehicle operators* – *e.g.*, bus drivers – have a particularly "strong aversion" to using seatbelts of any kind. *See id.* at 382. Based on this evidence of seatbelt "aversion" among heavy vehicle operators, *Hurley* concluded that NHTSA's decision to permit

installation of the less-restrictive two-point lap belt (as opposed to the more confining three-point lap/shoulder belt) was specifically designed to "promot[e] safety by encouraging drivers to use the safety equipment that manufacturers install." *Id.* *Hurley* ultimately held that, "as in *Geier*, the decision to leave options open to bus manufacturers *was made with specific policy objectives in mind.* Hurley's suit, if successful, would undermine that policy objective and is therefore preempted." *Id.* (emphasis added).

No such "specific policy objections" could possibly be implicated by this lawsuit. *Hurley's* reasoning would only apply here if NHTSA's decision to give *car makers* the choice of installing lap belts instead of lap/shoulder belts in rear seats was based on a desire to avoid aggravating the public's "aversion" to seatbelts. But the history of FMVSS 208 as it applies to *cars* – and not buses – itself disproves any such conclusion. As previously explained, Standard 208 has *always* required three point lap/shoulder belts in the front driver's and passenger seats of cars. It is therefore apparent that, in NHTSA's view, a three-point system has always been the safest form of manual restraint in *cars,* where the risk of driver "aversion" to seatbelts has not been an issue. Given that there was no evidence of driver "aversion" to seatbelts that influenced NHTSA's rulemaking with respect to the front seats of cars, it would make no sense to assume that any such concern animated the agency's decision to create a regulatory option with respect to the rear seats of cars. Instead, the rear-seat

option can best be understood as reflecting the agency's view (as set forth in the regulatory preamble) that, because rear seats are generally safer and less frequently occupied than front seats, there was no reason to mandate three-point lap/shoulder belts for all rear-center seats. Thus, none of the policy objectives at issue in *Hurley* has any application to this lawsuit.

In sum, there is no basis for this Court to find implied conflict preemption of plaintiffs' no-lap/shoulder-belt claim. The core teaching of *Geier* is that conflict preemption only exists where the common-law claims would directly undermine federal purposes. Try as it might, MAZDA has failed to identify even a single federal purpose that would be undermined or frustrated by a jury verdict holding it liable in this case. In light of the strong presumption against preemption, MAZDA's preemption defense must fail.

VI. PLAINTIFFS' FAILURE TO WARN CLAIM REGARDING THE LAP-ONLY BELT IS AN INDEPENDENT LEGAL THEORY THAT CANNOT BE PREEMPTED.

It is MAZDA's burden to establish Plaintiffs' failure to warn claims (TAC ¶ 30(a), 44, 45, 50, 55.) are preempted. *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956-957. As a matter of logic, since Plaintiffs' design defect claims are not preempted, their failure to warn claims cannot be preempted.

Nevertheless, even if this Court were to find that Plaintiffs' design defect claims are preempted, their failure to warn claims still cannot be preempted because those claims are independent of their design defect claims.

Under California law, a failure to warn claim is an independent legal theory that does not require any showing of design defect. See *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1110-1113. The jury "'must decide whether a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes "defective" simply by the absence of warning.'" *Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 699, quoting *Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 347. "The requisite warning may be of two kinds, each of which may have different implications. First, the manufacturer may be required adequately to instruct the consumer as to how the product should be used. . . . A second distinctive form of warning is that which informs a consumer . . . of potential risks or side effects which may follow the foreseeable use of the product." *Id.* (citations omitted). In short: "In some circumstances a warning or directions would have reduced the risk. In other circumstances the warning would simply have afforded the consumer an opportunity to make an informed choice." *Id.*

Here, PLAINTIFFS' failure to warn claim is not premised on MAZDA's failure to use lap-shoulder belts for the rear center seat, but upon MAZDA's

failure to warn about the dangers of the lap-only belt "because it did not restrain the upper torso of decedent Thanh Williamson, it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap only belt, and it was anchored at an unsafe angle to the SUBJECT VEHICLE." (TAC ¶ 29(a).). If MAZDA had warned Plaintiffs about these dangers, then Plaintiffs could have made an informed decision about (1) whether to purchase the subject vehicle, (2) whether to have Thanh Williamson or anyone else sit in the rear center seat, and (3) whether to install the lap-shoulder belt retrofit kit for the rear center seat. *Because no warnings or information was provided by MAZDA, Plaintiffs did not have the requisite knowledge to make any of these decisions.* That is the essence of Plaintiffs' failure to warn claim. This claim simply has no bearing upon MAZDA's decision to use the lap-only belt over the lap-shoulder belt.

MAZDA vainly attempts to distinguish *Carlin*, even though it was only cited for the general proposition that failure to warn is an independent legal theory, but tellingly, MAZDA utterly fails to address *Finn* and relies solely upon out-of-state authority *because there is no California authority to support its position.*

The weakness of MAZDA's position is belied by the fact that it relies heavily upon *Moser v. Ford Motor Co.* (N.D.W.Va. 2001) 2001 WL 1387600, *an unpublished out-of-state decision.* Since it is unpublished, *Moser* has no persuasive value here.

Even if it did, it would not apply because the court in that case held that the warnings at issue were preempted *solely* because the design defect claims were preempted. As discussed above, Plaintiffs warnings claims are independent of their design defect claims and therefore cannot be preempted.

MAZDA's reliance on several other out-of-state authorities is also misplaced because those cases are inapposite. See *James v. Mazda Motor Corp.* (11th Cir. 2000) 222 F.3d 1323, 1324 (involving failure to warn that the manual lap belt must be worn for automatic shoulder/manual lax belt system); *Irving v. Mazda Motor Corp.* (11th Cir. 1998) 136 F.3d 764, 770 (warnings at issue were preempted solely because the design defect claims were preempted), *Carrasquilla, supra,* 166 F.Supp.2d at 174 (warnings claims preempted only to the extent they attacked the choice of restraints under FMVSS 208).

To hold otherwise would immunize every automobile manufacturer from having to warn about the known dangers of a vehicle simply because an FMVSS gives them a choice of alternative safety devices. That would be contrary to the purposes of the Federal Motor Vehicle Safety Act and the savings clause set forth therein. See 15 U.S.C. § 1397(k) ("[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."); *Geier, supra,* 529 U.S. at 870 (savings clause evidences Congress' intent to "preserve" common law tort claims "that seek to establish greater safety than

the minimum safety achieved by a federal regulation intended to provide a floor.").

VII. CONCLUSION

For the foregoing reasons, Defendant MAZDA's demurrer and motion to strike must be denied in their entirety.

DATED: September 13, 2006

GIRARDI KEESE

By: /s/ David Lira
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc., a California corporation; FORD MOTOR COMPANY, a Delaware	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** **DEFENDANTS MAZDA MOTOR CORPORATION'S AND MAZDA MOTORS OF AMERICA, INC.'S REPLY TO PLAINTIFFS' OPPOSITION TO MAZDA'S MOTION TO STRIKE AND DEMURRER**

corporation; AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	**Date: September 26, 2006** **Time: 1:30 p.m.** **Dept.: C20** Action Filed: 7/07/04 Trial Date: 11/06/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

Defendants Mazda Motor Corporation ("MC") and Mazda Motors of America, Inc. ("MNAO") (collectively the "Mazda Defendants") hereby file their Memorandum of Points and Authorities in reply to Plaintiffs' Opposition to Defendants' Motion to Strike and Demurrer as follows:

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY

I. INTRODUCTION: DESPITE THE VERBAL CONTORTIONS EXECUTED BY PLAINTIFFS, THEIR LAP BELT-ONLY CLAIM IS STILL PREEMPTED

Plaintiff's Opposition effectively seeks to avoid this Court's prior preemption ruling by semantic magic. By sleight of word, they claim that into thin air has vanished two years' of claims that decedent Thanh Williamson's injuries were caused by the lack

of a 3-point seat belt in the rear center seat. And when the smoke clears, they show the Court the same lap belt-only claim, but think the Court will be fooled when Plaintiffs call that same claim by a different, preposterous name.

But preemption and this Court's ruling can and should not be so easily ignored. Plaintiffs' seat belt claims, so obviously based on the preempted claim that MC selected the wrong one of two options that the federal government offered, must be rejected.[1]

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[1] At the hearing on the Motion for Judgment on the Pleadings, this Court noted that "any injury that would have arisen because [the subject vehicle] had lap belt-only seats as opposed to the lap belt and shoulder seats, I believe the moving party is correct in that regard." (Hearing Transcript, p. 7). And the Court granted "the Motion for Judgment on the Pleadings to the extent of that theory of liability of the lap-only seat belt." (Hearing Transcript, p. 9-10). This Court allowed the plaintiffs leave to amend only to allege other causes of decedent's death. This Court neither gave plaintiffs leave to expand their lap belt-only theory of liability against Mazda, nor leave to intertwine their lap belt-only theory with other theories. This Court only granted plaintiffs leave to amend solely to flush out other bases for liability. Plaintiffs did not do so.

As this Court has already recognized, when the subject 1993 MPV was manufactured, NHTSA allowed manufacturers the choice of Type 1 or Type 2 belts in the center rear seating position for a variety of reasons. Having allowed that choice, plaintiffs cannot now contend that the Mazda defendants can be held liable in tort for exercising that choice.

II. PLAINTIFFS' COMPLAINT STILL RESTS ON A CLAIM THAT THE 2-POINT BELT CAUSED FATAL INJURIES THAT A 3-POINT BELT WOULD HAVE PREVENTED.

After this Court's preemption ruling, Plaintiffs filed a Third Amended Complaint that essentially faults the Mazda Defendants not because they used a two-point belt instead of a three- point belt, but rather, because the three-point belt did not act like a three-point belt. Plaintiffs' prior pleadings show that this is not a distinction at all, but if it is, it is one without a difference.

In their now superseded Second Amended Complaint, Plaintiffs alleged that, as to the seat belt, the Mazda MPV was defective in that:

> "It was equipped with inferior and unsafe two-point lap belts in the middle seating positions, *when it should reasonably have been equipped with three-point seat belts,* as the remaining seats in the SUBJECT VEHICLE."

Second Amended Complaint, ¶ 20 a, p. 5:4-6. (emphasis added.)

Plaintiffs reinforced that their claims were previously based on the lack of a three-point belt in their interrogatory responses (of which they sought judicial notice in support of their Opposition to the Mazda Defendants' successful Motion for Judgment on the Pleadings.) For example, Plaintiffs made the following claims:

– "More specifically, the 1993 Mazda MPV was defective in the following ways:

• The rear, outboard seat was equipped with lap-only belts, *causing passengers to 'jackknife.'* (See Plaintiffs' Request for Judicial Notice filed on or about June 22, 2006, Exhibit "A," Response to Interrogatory No. 1, p. 4: 16-18); and

– "More particularly, DEFENDANTS designed the SUBJECT VEHICLE so that the rear seats were equipped with lap only seat belts. Lap-only belts expose users to a substantial risk of abdominal injuries in frontal collisions. The superior and safer lap-shoulder belts were available to be installed in the SUBJECT VEHICLE at the time of assembly." (See Plaintiffs' Request for Judicial Notice filed on or about June 22, 2006, Exhibit "A," Response to Interrogatory No. 35, p. 16: 1-7); and

– *"A lap-shoulder belt would have prevented PLAINTIFFS ALEXA WILLIAMSON and THANH WILLIAMSON from 'jackknifing'* over the lap belt and thus, prevented severe abdominal injuries." (See Plaintiffs' Request for Judicial Notice filed on or about June 22, 2006, Exhibit "A," Response to Interrogatory No. 78, p. 27: 12-13) (emphasis added.)

Now, Plaintiffs state that

"The Third Amended Complaint no longer relies on the allegation that MAZDA

> should have utilized a lap-shoulder belt rather than a lap-only belt, but now alleges that the vehicle's lap-only belt is itself defective "because it did not restrain the upper torso of decedent Thanh Williamson, *it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap-only belt. . . .*"

(Plaintiffs' Opposition at 1:9-13.)(emphasis added.)

To reiterate, Plaintiffs alleged as follows in the SAC and TAC:

SAC: *A lap-shoulder belt would have prevented PLAINTIFFS ALEXA WILLIAMSON and THANH WILLIAMSON from 'jackknifing' over* the lap belt. . . ."

TAC: "the vehicle's lap-only belt is itself defective "because it did not restrain the upper torso of decedent Thanh Williamson, *it did not prevent the body of decedent Thanh Williamson from 'jackknifing' around the lap only belt. . . .*"

It cannot be seriously disputed that the Second and Third Amended Complaints are alleging the same seat belt claim. Nevertheless, Plaintiffs have the temerity to tell this Court that their claims "*do not rest on MAZDA's failure to utilize the lap-shoulder seat belt.*" Opposition at 5:5-8.

Were Plaintiffs truly abandoning their "lap-only belt claims," one would expect those claims to be absent from the TAC. It is thus curious indeed that

Plaintiffs never explain why they still repeatedly discuss a "lap-only belt" throughout the TAC. (See TAC, ¶¶s 29(a), 32, 33, 34, 35, and 36.) The obvious explanation is that Plaintiffs hope to still get to the jury the use of the lap-belt only claim despite this Court's clear prior ruling.

III. THE USE OF OTHER CLAIMS CANNOT REVIVE BARRED CLAIMS

Incredibly, Plaintiffs argue that, by tying their "lap-only belt" claims to other defect claims, they may make an end run around this Court's previous ruling and again allege that the vehicle was defective because it had "lap only belt." This is prohibited.

Plaintiffs cite *Carrasquilla v. Mazda Motor Corp.* (M.D.Pa. 2001) 166 F.Supp.2d 169 as permitting these allegedly intertwined claims. *Carrasquilla*, however, directly supports Mazda. In *Carrasquilla*, the plaintiffs claimed that the subject vehicle should have had an integrated 3-point belt because of the design of the seatback, seat track and the knee bolster. *Id.* at 177. The *Carrasquilla* Court rejected plaintiffs' gamesmanship. "[T]he Court views this precise claim by plaintiffs as nothing more than a backdoor attempt to attack once again defendants' exercise of one of the restraint system options under FMVSS 208." *Id.* at 178. The Court granted summary judgment as to all of plaintiffs' belt claims, all the failure to warn claims, and all defect claims which

were based upon the absence of a 3-point belt system. *Id.* at 181.

This Court should not fall for a backdoor effort similar to that rejected in *Carasquilla*. The only *new* seat belt claim in the Third Amended Complaint is that the lap belt was somehow anchored at an unsafe angle. Respectfully, this Court should grant the demurrer and motion to strike as it relates to all "lap-belt only" claims.[2] If any seat belt claim should survive, it would be the unsafe anchorage angle claim only.[3]

IV. PLAINTIFFS MISUNDERSTAND *GEER V. AMERICAN HONDA*

The rest of Plaintiffs' Opposition merely rehashes their unsuccessful arguments previously made in opposition to the Motion for Judgment on the Pleadings. In response here, the Mazda Defendants repeat their arguments supporting the original Motion for Judgment on the Pleadings.

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[2] Most of plaintiffs' allegations relate directly to the absence of a shoulder belt in the center seating position of rear seat no. one. As an example, in ¶33 of the Third Amended Complaint, plaintiffs allege that the Mazda defendants "engaged in despicable conduct in willful and conscious disregard of the safety of consumers by choosing to utilize a lap-only seatbelt for the center seating position of the middle bench seat in the SUBJECT VEHICLE instead of a three-point seatbelt." How is this allegation not preempted?

[3] This is another potentially preempted issue. FMVSS 209 proscribes the angles at which lap belts can be situated.

Throughout the Opposition, Plaintiffs assert that *Geier* should be narrowly interpreted and applied sparingly. This is ironic given the number of times that *Geier* has been cited for guidance, whether or not a court finds that preemption is warranted.

> *Geier is* not a narrow holding limited to automobile safety standards; instead it established a general rule upholding conflict preemption even if the applicable federal law contains a savings clause.

Dowhal v. Smithkline Beecham Consumer Healthcare (2004) 32 Cal.4th 910, 926 (citing *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 63.) It is ironic that the *Dowhal* court relied on *Sprietsma* – a case Plaintiffs cited for the exact opposite proposition.

Plaintiffs' attempt to limit *Geier* by referencing inapposite Ninth Circuit and District Court opinions. First, Plaintiffs cite *Leipart v. Guardian Industries* (9th Cir. 2000) 234 F.3d 1063 which concerned glass breakage safety standards for shower doors – a "non-auto context." What is critical about *Leipart* was that the plaintiffs claims there were *not* based upon an assertion that the shower door manufacturer chose one type of glass when it should have chosen another. No "wrong choice" claim was made.

This issue – whether a plaintiffs claims are based on the defendant's selection of regulation – provided options – was central also in the *Oxygenated Fuels Ass'n v. Davis* (9th Cir. 2003) 331 F.3d 665, 672

decision that Plaintiffs cite. The *Oxygenated Fuels* court distinguished its facts from *Geier*:

> "Second, the Supreme Court in *Geier* found abundant evidence in the administrative history of the FMVSS to indicate that it was intended to give auto manufacturers a choice of safety restraints. *See id.* at 875-83. We can find no evidence that the Clean Air Act was intended to give gasoline producers a comparable choice of oxygenates."

See Plaintiffs' Opposition at 16.

Thus, even the Plaintiffs' own authority shows two critical points. First, *Geier* is applicable outside the air bag/no air bag context. Second, the critical factor for whether *Geier* preemption applies is whether there was an intention by the regulation to provide options to the defendant. It is clear that FMVSS 208 gave the defendants the option of installing a lap/shoulder-belt, or lap belt, in the rear center seat.

Similarly, *Kent v. Daimler Chrysler Corp.* (N.D. Cal. 2002) 200 F.Supp. 2d 1208, 1210 and *Chamberlan v. Ford Motor Company* (N.D. Cal. 2004) 314 F.Supp. 2d 953 prove, rather than disprove, the viability of *Geier* and its applicability to this matter. In *Kent*, the court succinctly indicated why *Geier* was inapplicable:

> Defendant has pointed to nothing, either in the regulation or in the history of the regulation, suggesting that Plaintiffs' lawsuit

> frustrates the purpose of FMVSS 102. In contrast to the standard at issue in *Geier*, FMVSS 102 does not give manufactures [*sic*] a choice with respect to transmission design.

Kent, supra, 200 F.Supp. 2d at 1215. The *Kent* court could not have made it any clearer that it viewed *Geier* as turning on whether a manufacturer exercised a NHTSA-required choice.

Chamberlan involved a class action concerning allegedly defective intake manifolds, and whether injunctive relief under the California Unfair Competition Law was preempted by federal law. As Plaintiffs admit, the *Kent* court found that there was no substantive regulation at issue in its case. *Id.* at 17 (citing *Chamberlan, supra*, 314 F.Supp. 2d at 963). The *Kent* court's discussion of *Geier* is instructive:

> As the result of a considered policy choice, under FMVSS 208, manufacturers had no duty to install air bags at the time they manufactured the plaintiffs' car, yet the *Geier* plaintiffs' tort claims relied upon precisely such a duty. [Citing *Geier* at 529 U.S. at 881.] The Court held that allowing a State law tort claim to proceed under these circumstances would in effect impose a safety standard upon manufacturers different than that imposed by the Department of Transportation's well considered regulation.

Chamberlan, supra, 314 F.Supp. 2d at 963 (citing *Geier, supra*, 529 U.S. at 881.)

If one were to substitute the air bag discussion for one concerning shoulder/lap belts, the *Kent* court's description of *Geier* is equally applicable here. NHTSA made a considered policy choice under FMVSS 208, so manufacturers had no duty to select a lap/shoulder belt over a lap belt; NHTSA said it could choose *either* one. Allowing the Plaintiffs here to have a state law claim based upon the choice of one safety belt system over another would impose "a safety standard upon manufacturers different than that imposed by the Department of Transportation's well-considered regulation."

V. NHTSA'S PURPOSES WOULD BE FRUSTRATED BY BANNING ALL TYPE 1 BELTS

NHTSA's decision to provide a Type 1 option was deliberate. In fact, in the late 1980's, when it mandated lap/shoulder belts for rear *outboard* seating positions, NHTSA decided *not* to require lap/shoulder belts in rear non-outboard seating positions. See 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); 53 Fed. Reg. 47982, 47984-47985 (Nov. 29, 1988). In deciding to maintain the existing option for either lap belts or lap/shoulder belts in rear non-outboard positions, NHTSA focused on a number of important policy concerns.

First, NHTSA concluded that technical and cost issues weighed decisively against a lap/shoulder belt requirement for rear non-outboard seating positions. NHTSA noted that a number of commenters had

objected to the structural changes that would be needed for lap/shoulder belts in rear non-outboard seating positions. See 53 Fed. Reg. at 47984. Others pointed out the high costs and small anticipated benefits that rear center lap/shoulder belts would provide. *Id.*

The American Seat Belt Council had pointed out, *inter alia*, that lap/shoulder belts in rear center seating positions had "little field testing." *Id.* Other commenters noted that there would be difficulties in locating the anchorage for a rear center lap/shoulder belt in a variety of vehicles. The anchorages in hatchbacks or station wagons would have to be located either in the loadspace floor (disrupting the cargo carrying area) or on the vehicle roof (which would impede the driver's rearward vision). *Id.*

In the preamble to the November 1989 final rule on lap/shoulder belts in rear seating positions, NHTSA reiterated its conclusion that the lap/shoulder belt requirement should apply only to rear outboard seating positions, noting that:

> [s]ome commenters suggested that technologies and designs are available to provide lap/shoulder belts at rear center seating positions, and that NHTSA should further examine this issue. The agency explained in the NPRM that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield

> small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task. Accordingly, this rulemaking excluded further consideration of a requirement for center rear seating positions. None of the commenters presented any new data that would cause the agency to change its tentative conclusion on this subject that was announced in the NPRM.

54 Fed. Reg. at 46258.

NHTSA had also been concerned about the compatibility between child safety restraints and a requirement that lap/shoulder belts be provided at all rear designated positions. As noted above, the consistency between restraint requirements and child safety has been a recurring them [sic] in FMVSS 208 rulemakings. Thus, in denying the 1984 petition to require lap/shoulder belts at outboard rear seating positions, NHTSA not only disagreed with petitioners' premise that booster seats secured with lap/shoulder belts would be safer than would booster seats secured with tethers, but also stated that:

> [t]he installation of Type 2 belts in the rear outboard seating positions would make the installation of the conventional child safety seat much less convenient than with the current Type 1 belt. This would occur because the shoulder portion of a Type 2 belt would have to be placed behind the restraint, or otherwise moved out of the way, since most child restraints are designed to be used only

> with lap belts. This is an important consideration in view of the fact that 44 States and the District of Columbia have laws requiring the use of child safety seats. These State use laws make it desirable that compliance be accomplished as smoothly as possible.

49 Fed. Reg. at 15241-15242.

Against this background, the agency's decision not to require lap/shoulder belts in the rear center position; but rather to continue to give manufacturers the *option* of providing lap belts *or* lap/shoulder belts in rear non-outboard seats (including the rear center seat), makes eminent sense and clearly reflects a deliberate policy decision. The decision fosters flexibility, incorporates an appropriate assessment of the excessive costs that a lap/shoulder belt requirement would have imposed, reflects well-founded concerns – including safety concerns – about the technological problems that would be created by a lap/shoulder requirement for rear non-outboard seats, and demonstrates a prudent approach to the knotty and continuing dilemma posed by the seat belt/child restraint compatibility problem.

NHTSA has also recognized that lap belts should be allowed in seating positions which are adjacent to an aisle (like Mrs. Williamson in the subject MPV) to assist with ingress and egress for passengers going to the far rear seat.

> NHTSA has long recognized that belts installed at seating positions located adjacent to an aisle can impede ready access to or egress from seats located behind them. That is why we originally allowed lap belts at these seating positions.

69 Fed. Reg. No. 235, p. 70909.

VI. PLAINTIFFS' FAILURE TO WARN CLAIM ABOUT THE LAP ONLY BELT IS PREEMPTED

Just like Plaintiffs' assertions that MC should have used a 3-point belt in Mrs. Williamson's seating position rather than selecting the other option (a 2-point belt), Plaintiffs' failure to warn claims are preempted by FMVSS 208. Plaintiffs cited to *Carlin v. Superior Court* (1996) 13 Cal.4th 1104 and *Finn v. G. D. Searle & Co.* (1984) 35 Cal.3d 691, 699 for the proposition that a failure to warn claim is protected from preemption. Plaintiffs assert that a vehicle may become defective "simply by the absence of warning." *Id.* at 22-23.

The problem with plaintiffs' position is that they did not make these types of allegations in the Third Amended Complaint. The Third Amended Complaint alleges that the Mazda defendants "failed to adequately warn and instruct PLAINTIFFS and other consumers about the hazard, risks and dangers of" the alleged defects in the vehicle. (Third Amended Complaint, ¶ 30(a). **The failure to warn**

allegations come down to Plaintiffs' assertion that Mazda failed to warn that the belt was defective. This is not a claim that the lack of a warning made the "product flawlessly designed . . . became 'defective' simply by the absence of a warning." *G. D. Searle, supra,* 35 Cal.3d at 699. (See also *Carrasquilla v. Mazda Motor Corp., supra,* 166 F.Supp.2d at p. 177, where the court rejected plaintiffs claim that the subject vehicle should have had an integrated 3-point belt because of the design of the seatback, seat track and the knee bolster, and that defendant should be held liable for failing to warn of this defect. *Id.* at 177. Not only did the court reject all of plaintiffs' belt claims, it denied all failure to warn claims based upon the absence of a 3-point belt system. *Id.* at 181.

VII. PLAINTIFFS WAIVED ANY ERROR IN THIS COURT'S PRIOR RULING

"[W]here the plaintiff chooses to amend [after a demurrer is sustained with leave to amend], any error in the sustaining of the demurrer is ordinarily waived." (citing *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 311; *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)

While *County of Santa Clara* dealt with a demurrer, the rule is equally applicable to this Court's ruling on the Motion for Judgment on the Pleadings. *Singhania v. Uttarwar* (2006) 38

Cal.Rptr.3d 861, 866; *Anmaco, Inc. v. Bohlken* (1993) 16 Cal.Rptr.2d 675, 680. By acquiescing to this Court's ruling on the Motion for Judgment on the Pleadings and filing a Third Amended Complaint, Plaintiffs have waived any alleged error in this Court's prior ruling.

VIII. CONCLUSION

This Court previously dismissed as preempted Plaintiffs' claims that a three-point belt, instead of a "lap-only belt," would have prevented Plaintiffs' "jackknifing" and other injuries. Now, Plaintiffs seek to revive those claims by assert [sic] that the lap-only belt was defective because it did not prevent Plaintiffs' "jackknifing" and other injuries, i.e., the 2-point belt did not act like a 3-point belt.

These claims sound the same because, despite all of Plaintiffs' protestations, they are the same. Both claims are based upon the assertion that a 3-point belt would have prevented Plaintiffs' injuries.

The function of our courts relies on truth and examination, not illusion. A simple evaluation of Plaintiffs' seat belt claims shows that they are barred, and cannot be reconsidered through the TAC.

This Court's prior considered ruling dismissing the Plaintiffs' "lap-belt only" claims, and the underlying doctrine of preemption, cannot be gutted by Plaintiffs' verbal sophistry. The Mazda Defendants'

Demurrers and Motion to Strike should be granted without leave to amend.

DATED: September 19, 2006

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SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
DEPARTMENT C20

DELBERT WILLIAMSON, ET AL.,	)	
PLAINTIFFS,	)	
VS.	)	NO. 04CC06494
MAZDA MOTOR OF AMERICA, INC.,	)	
DEFENDANT.	)	

THE HONORABLE
MICHAEL BRENNER, JUDGE PRESIDING

REPORTER'S TRANSCRIPT

TUESDAY, SEPTEMBER 26, 2006

APPEARANCES OF COUNSEL:

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ATTORNEYS AT LAW
BY: DAVID R. LIRA

FOR DEFENDANT: BOWMAN AND BROOKE
ATTORNEYS AT LAW
BY: JULIAN G. SENIOR
AND
BRIAN TAKAHASHI

KIMBERLY REX, RMR, CSR #6638
OFFICIAL COURT REPORTER

[2] **SANTA ANA, CALIFORNIA – TUESDAY, SEPTEMBER 26, 2006**

AFTERNOON SESSION

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: WELL, WILLIAMSON VERSUS MAZDA MOTORS OF AMERICA.

MR. LIRA: GOOD AFTERNOON. DAVID LIRA, GIRARDI AND KEESE ON BEHALF OF THE PLAINTIFFS IN THIS ACTION.

MR. SENIOR: GOOD AFTERNOON, YOUR HONOR. JULIAN SENIOR ON BEHALF OF THE MAZDA DEFENDANTS.

MR. TAKAHASHI: BRIAN TAKAHASHI FOR BOWMAN AND BROOKE ON BEHALF OF MAZDA MOTOR CORPORATION, MAZDA MOTORS, INC.

THE COURT: WELL, HERE IS JUST ONE INITIAL THOUGHT ON MY MIND, IT MAY BE THAT THE DEFENDANT CANNOT BE LIABLE FOR CHOOSING A TWO-POINT SEAT BELT INSTEAD OF A THREE-POINT SEAT BELT.

IT MAY BE THAT – IT SEEMS LIKE I HAVE RULED THAT THE DEPARTMENT OF TRANSPORTATION, AS I REMEMBER THIS, SURVEYED ALL THIS, DECIDED THAT THEY HAD A METHOD OF PROCEEDING THAT WAS GOING TO HAVE DIFFERENT KINDS OF – IT WAS

GOING TO REQUIRE PASSIVE RESTRAINTS FOR SAFETY REASONS; BUT, THE SECRETARY, SOMEBODY DETERMINED THAT IT WOULD BE BETTER TO HAVE DIVERSITY OF PASSIVE RESTRAINTS. AND THE REASON FOR THAT WAS – WELL, THERE WAS ALL KINDS OF [3] REASONS.

AND THAT IS ALL MENTIONED IN ALL THESE CASES. BUT THAT DOESN'T MEAN THAT YOU COULDN'T STATE A CAUSE OF ACTION BASED – ONCE YOU DECIDE TO PUT A TWO-POINT – WELL, A LAP BELT IN, YOU COULD BE NEGLIGENT IN HOW YOU HOOKED IT UP OR NEGLIGENT IN HOW YOU DESIGN THE SEAT THAT WAS GOING TO ACCOMMODATE IT, OR ANY OTHER TORT THEORY.

AND IT SEEMS LIKE, PERHAPS, THAT IS WHAT THE PLAINTIFFS HAVE ADEQUATELY PLED IN THIS – WHATEVER THE COMPLAINT IT IS.

MR. LIRA: THIRD.

THE COURT: THIRD AMENDED COMPLAINT. SO, TENTATIVELY I WOULD OVERRULE THE DEMURRER.

MR. SENIOR: YOUR HONOR, IF I MAY?

THE COURT: YES.

MR. SENIOR: I WOULD AGREE WITH ALMOST EVERYTHING YOU SAID EXCEPT FOR

THE LAST PORTION OF WHAT YOU SAID IN YOUR TENTATIVE.

FIRST OF ALL, LET ME JUST BACK UP ON THE HISTORY OF IT.

THE COURT: I READ – I DON'T WANT TO -- SORRY TO INTERRUPT YOU, BUT I HAVE READ ALL OF IT. TODAY SOMEBODY SUBMITTED A NEW, YOU KNOW, MORE MATERIAL FROM THE DEPARTMENT OF TRANSPORTATION, 1.5 OR SOMETHING. I GLANCED THROUGH THIS.

MR. SENIOR: WELL, I THINK THE FIRST THING THAT GOES [4] VIS-A-VIS OUR MOTION TO STRIKE IS THE FACT THAT YOU SPECIFICALLY TOLD PLAINTIFFS THAT THEY HAD THE RIGHT TO PLEAD OTHER CAUSES OF ACTION, SUCH AS, AND I THINK YOUR QUOTE IS, MAYBE IT IS THE DESIGN OF ANGLE OF THE SEAT, THE BACK OF THE SEAT, I FORGET EXACTLY, BUT THERE ARE OTHER THEORIES.

SO YOU SAID THAT THEY CANNOT ADD NEW THEORIES, BUT THEY CAN JUST MORE OR LESS FLUSH OUT THE IDEA THAT THERE WERE OTHER THEORIES. THAT IS ON PAGE 10 OF THE TRANSCRIPT.

NOW, IN THE THIRD AMENDED COMPLAINT, AND THIS IS IN OUR MOTION TO STRIKE, THEY ADDED 17 PARAGRAPHS THAT ONLY GO TO THE LAP BELT. THAT IS ALL THEY TALK ABOUT, THE FMVSS STANDARDS, THE REQUIREMENTS, THE

HISTORY OF FMVSS 208 AS IT GOES TO LAP BELTS.

THE COURT: I KNOW. THERE IS A LOT OF THAT IN THERE. LET ME ASK YOU THIS, AT THE TIME OF TRIAL, SOME TRIAL JUDGE IS GOING TO HAVE SORT THIS ALL OUT, HOW YOU – AS I STARTED READING THAT COMPLAINT, INITIALLY YOU THINK, WAIT A MINUTE, WE'RE BACK TO THE LAP BELT AGAIN.

I READ IT AND REFLECTED ON IT, IT SEEMED TO ME, AND I WANT TO HEAR FROM YOU, BUT THEY ESSENTIALLY READ AS A WHOLE – I KNOW THEY PUT IN A LOT OF STUFF ABOUT NO JURY IS EVER GOING TO HEAR ABOUT ALL THIS TRANSPORTATION SAFETY BUSINESS; BUT ESSENTIALLY THAT, YOU KNOW, THAT THEY HAVE ADEQUATELY PLED THAT IN THE COMPLAINT.

[5] THAT YOU CAN – THE WAY THIS LAP BELT WAS INSTALLED, THERE IS ALLEGATIONS IN THERE ABOUT THE MATERIALS USED AND THE CRASH WORTHINESS OR SOMETHING, BUT ALSO THE SEAT, I REMEMBER THAT SPECIFICALLY, HOW THE – I MEAN, HOW YOU COULD – IT CAN'T BE THAT ONCE YOU COULD HAVE A LAP BELT, THAT YOU COULD JUST PUT ANYTHING IN THERE ANYWHERE. THAT CAN'T BE.

MR. SENIOR: NO, THAT IS NOT WHAT THE MAZDA DEFENDANTS ARE SAYING. WE ARE NOT ARGUING THAT THEY ARE PREEMPTED

FROM ALLEGING THAT THE SEAT BACK IN THE VEHICLE IS DEFECTIVE.

WE'RE NOT ARGUING THAT THEY'RE PREEMPTED FROM SAYING THE SEAT CUSHION IS DEFECTIVE OR THE VEHICLE STRUCTURE IS DEFECTIVE.

BUT, FOR EXAMPLE, IN PARAGRAPH 29(A) THEY MAKE THE EXACT SAME ALLEGATION THEY DID BEFORE," THE CENTER SEAT POSITION WAS EQUIPPED WITH AN INFERIOR AND UNSAFE LAP ONLY BELT. IT DID NOT PROVIDE ADEQUATE PROTECTION BECAUSE IT DID NOT RESTRAIN THE UPPER TORSO OF THE DECEDENT. IT DID NOT PREVENT THE BODY OF THE DECEDENT FROM JACK-KNIFING AROUND THE LAP ONLY BELT."

NOW THEY CAN'T HAVE THOSE EXACT SAME ALLEGATIONS THAT THEY HAD BEFORE. THEY CAN TALK ABOUT THE ANCHORAGE POSITION.

THE COURT: THOSE ARE JUST ALLEGATIONS. WHERE ARE WE GOING ON THIS CASE? SOMEHOW WE HAVE TO GET SOME CLOSURE [6] HERE. YOU CAN PICK THROUGH THIS COMPLAINT FOREVER.

BUT IT SEEMS TO ME AT THE TIME OF TRIAL MAYBE THIS WILL ALL BE MOTIONS IN LIMINE, BUT WHAT I HAVE RULED SO FAR IS THAT YOU CAN'T HAVE LIABILITY JUST BASED

ON IT BEING A LAP BELT. RIGHT OR WRONG, WHETHER I AM RIGHT OR WRONG ON THAT, THAT IS THE COURT'S RULING.

AND TO THE EXTENT YOU DID THAT, YOU CAN FIND THAT LANGUAGE IN THERE, WELL, I DON'T THINK THEY'RE GOING TO BE ABLE TO PROCEED ON THAT.

MR. SENIOR: BUT THOSE PARAGRAPHS SHOULD BE STRICKEN FROM THE COMPLAINT BECAUSE WE'RE GOING TO BE BACK HERE AGAIN ON A MOTION IN LIMINE, WE'RE GOING TO BE BACK HERE AGAIN ON A MOTION FOR JUDGMENT ON THE PLEADINGS.

I MEAN, FOR THEM TO ARGUE THAT THEY'RE NOT TALKING ABOUT THE LAP ONLY BELT IS A LITTLE RIDICULOUS WHEN THEIR BRIEF THAT THEY SUBMITTED IN OPPOSITION TO OUR DEMURRER –

THE COURT: THE COMPLAINT IS SORT OF A BRIEF IN A CERTAIN WAY.

MR. SENIOR: EXACTLY. WHICH THEY DIDN'T HAVE LEAVE TO DO. BUT THE BRIEF THAT THEY SUBMITTED IS VERBATIM, PAGES 7 THROUGH 22 OF THIS OPPOSITION, SAME AS 3 THROUGH 16 INCLUDING A SECTION THAT SAYS THAT THE CHOICE OF USING A – "PLAINTIFF'S CLAIMS REGARDING A LACK OF A THREE-POINT SEAT BELT ARE NOT IMPLIEDLY

PREEMPTED BY 208." THEY'RE MAKING THE SAME ARGUMENT AGAIN.

[7] WE DON'T WANT TO BE FACING THIS EXACT SAME ARGUMENT – YOU KNOW, WE HAVE A TRIAL NOVEMBER 6TH AND THEY STILL HAVE GOT THESE ALLEGATIONS IN BLATANT VIOLATION OF THIS COURT'S ORDER. THEY DIDN'T ASK FOR RE-HEARING. THEY DIDN'T APPEAL THIS COURT'S ORDER. WE SHOULD AT LEAST STRIKE ANY REFERENCE TO LAP ONLY BELT.

THE PARAGRAPHS THAT WE REQUESTED TO BE STRICKEN, THEY CAN PROCEED ON THESE OTHER CLAIMS: THE SEAT BACK CLAIMS, THESE SEAT CUSHION CLAIMS, THE GEOMETRY CLAIMS PERHAPS.

THE COURT: WE'RE JUST NOW TALKING ABOUT THE LAP ONLY BELT. YOU HAVE A RIGHT – ALL OF YOU KNOW THIS AREA VERY WELL. SEE, JUST SITTING HERE THIS AFTERNOON, IT'S VERY HARD FOR A TRIAL COURT TO COME UP TO SPEED THAT YOU GUYS ARE ON ON THIS KIND OF, WHAT SEEMS TO ME, TO BE SORT OF AN ARCANE ISSUE. I AM SURE YOU GUYS KNOW IT VERY WELL.

WE'RE GOING TO BE TALKING ABOUT A LAP ONLY BELT. IF YOU CHOOSE A LAP ONLY BELT, THEN YOU HAVE TO DESIGN AROUND THE LAP ONLY BELT.

MR. SENIOR: I THINK WE WOULD TAKE ISSUE WITH NEVER USING THE PHRASE "LAP ONLY" CONSIDERING THAT THAT IMPLIES THAT THERE SHOULD BE MORE, WHICH I THINK PREEMPTS IT.

THE COURT: THAT MAY BE TRUE. I DON'T THINK THAT ANYTHING I COULD DO TODAY WILL ELIMINATE MOTIONS IN LIMINE, TO BE HONEST WITH YOU.

MR. SENIOR: SO THEY BROUGHT THE EXACT SAME CLAIMS [8] THAT WERE ALREADY ADJUDICATED. AND ACTUALLY, AS A MATTER OF JUST PROCEDURE, YOUR HONOR, WE'RE STILL AWAITING YOUR HONOR'S SIGNATURE ON THE ORDER FROM THE MOTION JUDGMENT ON THE PLEADINGS HERE. I THINK SEVERAL ORDERS WERE SUBMITTED. WE HAVEN'T HAD A SIGNED ORDER YET.

MR. TAKAHASHI: YOUR HONOR, IF I MIGHT ADD, IF YOU DO STRIKE WHAT WE REQUESTED THAT DEAL WITH THE PARAGRAPHS THAT DEAL WITH THE LAP ONLY AND YOU STRIKE THE PORTIONS OF THEIR COMPLAINT THAT TALKS ABOUT LAP ONLY, LEAVE IT TO THE GEOMETRY CLAIM, THE SEAT BACK CLAIM, WE'RE ABOUT TO EMBARK ON A WHOLE BUNCH OF EXPERT DEPOSITIONS, AND THIS CASE WOULD BE A LOT CLEARER AS TO WHAT PEOPLE CAN AND CANNOT TALK ABOUT.

SO THIS REALLY IS IMPORTANT FROM AN EFFICIENCY STANDPOINT AS WE PROCEED FORWARD IN THE CASE.

THEY HAVE FLOUTED THE PREVIOUS COURT ORDER WHICH SAYS THAT THEY CANNOT BRING A LAP-ONLY CLAIM. AND IT IS LAP ONLY THROUGHOUT AND THROUGHOUT AND THROUGHOUT.

WHEN THEY TALK ABOUT THE LAP ONLY NOT RESTRAINING THE UPPER TORSO, THEY'RE BASICALLY SAYING THE ALTERNATIVE DESIGN SHOULD HAVE BEEN A SHOULDER BELT.

SO STRIKING PORTIONS OF THEIR COMPLAINT IS VERY IMPORTANT FOR HOW DISCOVERY PROCEEDS IN THE NEXT FEW MONTHS – NOT FEW MONTHS, FEW WEEKS.

MR. LIRA: YES, YOUR HONOR, IF I MAY. I WASN'T HERE AT THE LAST HEARING, AND I THOUGHT LONG AND HARD AFTER [9] READING ALL THE BRIEFS IN THIS CASE, CONSIDERING THE COURT'S ORDER AND BEING THE PERSON THAT WOULD TRY THIS CASE ON BEHALF OF PLAINTIFFS, I WAS LOOKING AHEAD.

WHAT EVIDENCE CAN I PUT ON AND WHAT EVIDENCE WILL BE BARRED BASED ON THE RULING?

WE RESPECTFULLY DISAGREE WITH THE COURT'S INTERPRETATION OF *GEIER*, WHICH IS AN AIR BAG CASE WHICH INVOLVED A

PASSENGER RESTRAINT. THESE SEAT BELTS ARE NOT PASSENGER RESTRAINTS. YOU HAVE TO HOOK THEM.

SO THERE IS A DISTINCTION THERE THAT WE THINK THERE IS –

THE COURT: I THOUGHT THAT MAKES THEM PASSIVE IN THAT AT THE TIME OF THE ACCIDENT THE DRIVER DOESN'T HAVE TO DO ANYTHING. THAT STILL – I AM TALKING ABOUT SOMETHING THAT YOU KNOW ALL ABOUT THAT I DON'T.

MY IMPRESSION FROM READING THIS IS THAT IS ALSO A PASSIVE RESTRAINT. YOU COULD HAVE OTHER PASSIVE – YOU COULD MAKE THE INSIDE OF THE CAR OUT OF MARSHMALLOW OR SOMETHING. BUT THE – I THOUGHT THAT THE DEFINITION OF A PASSIVE RESTRAINT IS SOMETHING THAT PASSENGERS DIDN'T HAVE – ONCE YOU START THE CAR ROLLING, YOU DON'T HAVE TO DO ANYTHING.

MR. LIRA: NO. THE PASSIVE RESTRAINTS FOR SEAT BELTS IS OLD DAYS IS WHEN YOU SAT DOWN YOU CLOSED YOUR DOOR AND IT LATCHED OVER YOU. YOU DID NOTHING. THESE BELTS YOU HAVE TO MANLY [sic] INSERT. SO THEY DON'T FALL UNDER THE [10] DEFINITION OF PASSIVE RESTRAINT UNDER THE NHTSA RULES, AND I THINK COUNSEL WILL AGREE WITH THAT.

WHEN I WAS THINKING LONG AND HARD ABOUT THIS CASE, YOUR HONOR, THERE IS NO PRECEDENT IN THE STATE OF CALIFORNIA AS YOU KNOW. NO CASE LAW REGARDING CONTRACT PREEMPTION AS TO ACTIVE RESTRAINTS, WHICH THIS IS.

AND WE'RE OF THE OPINION, AND I DON'T WANT TO REARGUE THE PAST MOTION, THAT THERE IS NO IMPLIED CONFLICT BECAUSE THERE IS NO OBSTACLE TO WHAT NHTSA IS TRYING TO DO REQUIRING SEAT BELTS IN THEIR VEHICLES.

AND I AM THE ONE, I AM THE CULPRIT THAT THIS AFTERNOON FILED A REQUEST FOR JUDICIAL NOTICE OF THE FEDERAL REGISTER, THE LAST TIME 208 WAS AMENDED, WHICH IS DECEMBER 8, 2004, WHEN THEY'RE TALKING ABOUT ANTON'S LAW WHICH TAKES EFFECT IN 2007 WHERE ALL SEATS MUST HAVE THE THREE-POINT BELTS REGARDLESS.

AND IN THEIR – AND AT PAGE 70912, UNDER FEDERAL, AND THEY'RE TALKING ABOUT THE HISTORY OF THREE-POINT, TWO-POINT, THEY SAY THE FINAL RULE IS NOT INTENDED TO PREEMPT STATE TORT CIVIL ACTION. I HAVE BEEN DOING THESE CASES FOR EIGHT YEARS, I HAVE NEVER BEEN PREEMPTED ON THESE TYPES OF CASES.

AND WITH THE COURT'S RULING AS IT PRESENTLY STANDS, I DON'T THINK I COULD

PUT ON A CASE ON BEHALF OF MY CLIENTS. I REALLY DON'T.

AND I READ – I AM VERY FAMILIAR WITH THE [11] LEGISLATIVE HISTORY, HOW OUR GOOD ATTORNEY GENERAL SAID DO NOT ADOPT *GEIER* OR DON'T LET IT GO BEYOND THE FOUR LETTERS OF THAT RULING.

AND IN *GEIER* –

THE COURT: HOW CAN WE SET IT UP SO THAT YOU CAN GET APPELLATE REVIEW?

MR. LIRA: IF YOU STRIKE ALL THESE ALLEGATIONS, I AM LEFT WITH NOTHING. BECAUSE I WILL BE CANDID WITH THIS COURT, I AM ONLY THINKING ABOUT THE TRIAL. I AM NOT GOING TO OFFEND THE COURT BY TRYING TO GET EVIDENCE IN THAT IS BARRED.

THE PLAINTIFFS IN THIS CASE THAT SUFFERED THE LOSS OR THE DEATH OF THIS YOUNG WOMAN, WE SPENT HUNDREDS OF THOUSANDS OF DOLLARS DOING TESTING. SLED TESTING TO PROVE OUR POINTS ABOUT THE INFERIOR NATURE OF THIS LAP ONLY BELT. SHE WAS EVISCERATED BY THIS BELT. WE SPENT HUNDREDS OF THOUSANDS OF DOLLARS.

NOW WHAT I AM THINKING ABOUT THE COURT'S RULING, WE CAN'T TALK ABOUT THE BELT. BUT THE BELT IS INTEGRAL BECAUSE HAD SHE HAD THE THREE-POINT BELT LIKE

THE TWO OTHER OCCUPANTS, SHE WOULD BE HERE TODAY. THEY SURVIVED.

THE COURT: THAT IS WHERE YOU DISAGREE WITH THE COURT.

MR. LIRA: YES, EXACTLY.

MR. SENIOR: YOU SEE MY POINT, YOUR HONOR? THAT [12] THEY ARE STILL TRYING TO MAKE THESE THREE-POINT BELT CLAIMS IN THIS COMPLAINT. THAT IS WHAT THEY'RE GOING TO DO THROUGHOUT.

THE COURT: WELL, THIS IS JUST TALKING ABOUT NOTHING; BUT, INFORMALLY, THAT IS WHY IT OCCURRED TO ME. IF I AM WRONG ON THIS, THERE SHOULD BE SOME REVIEW ON THIS BY THOSE WHO HAVE MORE TIME TO LOOK AT THIS THAN I DO. THAT IS MY RULING.

MR. LIRA: AND I AGREE, YOUR HONOR. I AM THINKING – I AM HERE THINKING I DON'T WANT TO CHARGE MY CLIENTS THE COST OF FLYING ALL MY CLIENT EXPERTS FROM ALL OVER THE COUNTRY, THEIR EXPERTS, AND SPEND ANOTHER 100,000 OR SO IN MONEY FOR A CLAIM THAT IS NOT GOING TO HAVE ANY LEGS IF WE CANNOT REFER TO THE THREE-POINT VERSUS TWO-POINT BELT. WE WON'T BE ABLE TO DO IT.

I WILL BE TRYING A CASE IN FRONT OF YOU ON NOVEMBER 6, MIGHT AS WELL GIVE A NON-SUIT.

THE COURT: WHAT WOULD YOU LIKE ME TO DO?

MR. LIRA: I THINK SO I CAN SEEK APPELLATE REVIEW BASED ON THE PRIOR RULING, IF THE COURT WAS TO SUSTAIN THE DEMURRER COMPLETELY WITHOUT LEAVE, THEN I KNOW WHERE I GOT TO GO. WITH A WRIT – I AM NOT SAYING I AGREE WITH THE COURT YOU SHOULD DO IT, BUT THE OUT-COME WOULD BE IF YOU DISMISS THE CASE WITHOUT LEAVE, THEN I WILL TAKE MY CHANCES WITH THE COURT OF APPEALS.

AND I DON'T SAY THAT WITH ANY DIS-RESPECT.

[13] THE COURT: I UNDERSTAND THAT.

MR. LIRA: I AM THINKING OF THE MONEY INVOLVED HERE AND WHAT WE HAVE SPENT SO FAR.

THE COURT: AND, FRANKLY, I THOUGHT ABOUT THAT WHEN COUNSEL MADE HIS STATEMENT. I KNOW EVERYBODY STARTS SPENDING MONEY LIKE MAD. AND I THINK THAT YOU OUGHT TO – I CERTAINLY WOULD WELCOME A REVIEW OF MY RULING IN THAT REGARD.

MR. LIRA: I KNOW –

THE COURT: AND THAT IS WHAT I WILL DO. MAYBE I WILL JUST SUSTAIN THIS WITHOUT LEAVE, AND THAT WILL GIVE YOU THAT OPPORTUNITY.

MR. SENIOR: I HAVE NO OBJECTION TO MR. LIRA'S SUGGESTION.

MR. TAKAHASHI: WE HAVE NO OBJECTION.

MR. LIRA: AND THE REASON I SAY THAT, YOUR HONOR, IS BECAUSE THIS WILL BE A CASE OF FIRST IMPRESSION IN THE STATE OF CALIFORNIA. I TELL YOU, I HAVE 50 OTHER CASES IDENTICAL TO THIS WHERE SOMEONE HAS BEEN KILLED OR IS A QUADRIPLEGIC BECAUSE OF THESE LAP BELTS. AND WE WANT TO KNOW, I MEAN THE PLAINTIFFS' BAR, WHERE WE STAND ON THIS.

THE COURT: IT ISN'T GOING TO OFFEND ME A BIT.

MR. TAKAHASHI: AND, YOUR HONOR, FOR THE RECORD THIS IS A VERY HIGH-ENERGY CRASH, AND TO SAY THAT PEOPLE ARE EVISCERATED OR KILLED BECAUSE OF THE LAP BELT, WE TAKE ISSUE WITH THAT.

[14] MR. LIRA: SEE MY CLIENTS.

THE COURT: THAT IS NOT WHAT WE'RE TALKING ABOUT. ALL RIGHT. ANYTHING FURTHER?

MR. TAKAHASHI: NO, YOUR HONOR. IF THAT IS THE RULING OF THE COURT.

MR. SENIOR: WELL, IS THAT THE RULING OF THE COURT?

THE COURT: THERE YOU GO. DEMURRER SUSTAINED WITHOUT LEAVE.

MR. LIRA: AS TO ALL CAUSES OF ACTION?

THE COURT: AS TO ALL CAUSES OF ACTION.

MR. LIRA: THANK YOU, YOUR HONOR.

MR. TAKAHASHI: THANK YOU, YOUR HONOR.

MR. SENIOR: THANK YOU VERY MUCH, YOUR HONOR.

THE COURT: WHO KNOWS, I MAY SEE YOU BACK.

MR. LIRA: WHO KNOWS, I AM NOT MAKING ANY PREDICTIONS. THAT IS THE REALITY OF THE CASE.

THE COURT: AND LET ME JUST SAY THIS OFF THE RECORD.

(DISCUSSION OFF THE RECORD)

MR. SENIOR: BACK ON THE RECORD.

THE COURT: YES. BACK ON THE RECORD.

MR. SENIOR: YOUR HONOR, I THINK WE HAVE A NOVEMBER 6TH TRIAL DATE.

THE COURT: OBVIOUSLY GOING TO VACATE THAT.

MR. SENIOR: OKAY.

MR. LIRA: THANK YOU, YOUR HONOR.

MR. TAKAHASHI: JUST ONE OTHER ISSUE, JUST REALLY WE [15] ATTACKED THE DECEDENT'S CLAIM, WE'VE GOT INDIVIDUAL CLAIMS THAT WE'RE PROBABLY GOING TO DISMISS FOR WAIVER OF COST. THAT WILL PROBABLY FOLLOW.

MR. LIRA: EXACTLY, AS TO THE OTHER TWO OCCUPANTS.

THE COURT: THAT WILL ALL WORK OUT.

MR. LIRA: YES. WE APPRECIATE IT.

THE COURT: THANK YOU VERY MUCH. IT WILL BE INTERESTING.

(END OF PROCEEDINGS)

* * *

[Reporter's Certificate Omitted In Printing]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
MINUTE ORDER
26-SEP-2006

Dept: C20 CENTRAL JUSTICE CENTER

Convened at: 1:30:00

Judge/Comm: MICHAEL BRENNER

Clerk: CORA BOLISAY

Bailiff: S. GRIMES

Reporter: KIMBERLY REX
CSR#663 8

Court Type: CIVIL

Court Category: WD – OTHER

Case Number: 04CC06494

Case Title: WILLIAMSON VS MAZDA MOTOR OF AMERICA INC

Doct Seq No: 107

Event: 654 MOTION TO STRIKE

Filing Party: MAZDA MOTOR OF AMERICA INC

683 DEMURRER TO AMENDED COMPLAINT

Filing Party: MAZDA MOTOR CORPORATION

Appearances:

Plaintiff Attorney: **GIRARDI AND KEESE, David R. Lira**

Defendant Attorney: **BOWMAN & BROOKE LLP,**
Julian G. Senior,
Brian Takahashi

Argument heard. Defendant's demurrer to 3rd amended complaint is sustained without leave to amend. Motion to Strike is moot. Entered: 09-26-2006/#13

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williams and Alexa Williamson,

Plaintiffs,

vs.

MAZDA MOTOR OF AMERICA, Inc, a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC

CASE NO. 04CC06494

Assigned: Hon. Michael Brenner
Department: C20

Date: September 26, 2006
Time: 1:30 p.m.
Dept.: "C20"

~~**[PROPOSED]**~~ **ORDER SUSTAINING DEMURRER TO PLAINTIFFS' THIRD AMENDED COMPLAINT**

(Filed Oct. 25, 2006)

EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	))))))))	Action Filed: 7/07/04 Trial Date: 11/06/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

The Demurrer of Defendants Mazda Motor Corporation and Mazda Motor of America, Inc. dba Mazda North American Operations came on regularly for hearing before this Court on September 26, 2006. Brian Takahashi and Julian G. Senior of Bowman and Brooke LLP appeared for Defendant and moving parties Mazda Motor Corporation and Mazda Motor of America, Inc. David Lira of Girardi & Keese appeared for plaintiffs.

After considering the moving, opposition reply papers, arguments of counsel, and all other matters presented to the court, and good cause appearing therefore, it is hereby ordered that the Mazda Defendants' Demurrer is sustained without leave to amend as to all of plaintiffs' claims arising out of the death of Thanh Williamson and judgment is rendered in favor of defendants Mazda Motor Corporation and Mazda Motor of America, Inc. dba Mazda North American Operations

IT IS SO ORDERED:

DATED: OCT 25 2006

/s/ Michael Brenner
JUDGE OF THE
SUPERIOR COURT
MICHAEL BRENNER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; and ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williams [sic] and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, Inc, a California corporation; FORD MOTOR COMPANY, a Delaware corporation; AUTOMATIC	**CASE NO. 04CC06494** **Assigned: Hon. Michael Brenner** **Department: C20** Date: September 26, 2006 Time: 1:30 p.m. Dept.: "C20" ~~**[PROPOSED]**~~ **[AMENDED] ORDER SUSTAINING DEMURRER TO PLAINTIFFS' THIRD AMENDED COMPLAINT**

EQUIPMENT MANUFACTURING COMPANY, a Nebraska corporation; MAZDA MOTOR CORPORATION, a Japanese corporation; and DOES 1-100, inclusive, Defendants.	(Filed Feb. 07, 2007) Action Filed: 7/07/04 Trial Date: 11/06/06 Motion Cutoff: 7/23/06 Discovery Cutoff: 7/08/06

The Demurrer of Defendants Mazda Motor Corporation and Mazda Motor of America, Inc. dba Mazda North American Operations came on regularly for hearing before this Court on September 26, 2006. Brian Takahashi and Julian G. Senior of Bowman and Brooke LLP appeared for Defendant and moving parties Mazda Motor Corporation and Mazda Motor of America, Inc. David Lira of Girardi & Keese appeared for Plaintiffs.

After considering the moving, opposition reply papers, arguments of counsel, and all other matters presented to the court, and good cause appearing therefore, it is hereby ordered that the Mazda Defendants' Demurrer is sustained without leave to amend as to all of plaintiffs' claims arising out of the death of Thanh Williamson, as the plaintiffs have failed to state facts sufficient to constitute a cause of action with respect to those claims, and judgment is rendered in favor of defendants Mazda Motor Corporation and Mazda Motor of America, Inc. dba Mazda North American Operations

IT IS SO ORDERED.

DATED: FEB 07 2007

MICHAEL BRENNER

MICHAEL BRENNER
JUDGE OF THE
SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD MOTOR COMPANY,	**CASE NO. 04CC06494** Hon. Michael Brenner (Dept. C-20) **STIPULATION AND {PROPOSED} ORDER TO DISMISS PLAINTIFFS' REMAINING CLAIMS AND FOR ENTRY OF JUDGMENT** (Filed Jun 18, 2007) Complaint filed: July 7, 2004

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, MAZDA MOTOR CORPORATION, and DOES 1-100, inclusive, Defendants.	Trial Date: August 7, 2006

TO THE COURT, ALL PARTIES, AND TO THEIR ATTORNEYS OF RECORD:

IT IS HEREBY STIPULATED by and between the parties through their respective attorneys as follows:

1. On February 7, 2007, the Court entered an Amended Order sustaining Defendant Mazda Motor Corporation's Demurrer to Plaintiffs' Third Amended Complaint. This Order dismissed, without leave to amend, all of Plaintiffs' claims arising out of the death of Thanh Williamson, including their wrongful death claims and *Dillon v. Legg* claims.

2. Plaintiffs' remaining claims arise out of their own personal injuries from the subject accident. As to those claims, the parties hereby stipulate to dismiss those claims with prejudice.

3. The parties also stipulate to defer the issue of recovery of costs arising out of Plaintiffs' claims until after Plaintiffs have resolved their appeal of this Judgment or the time to file an appeal has expired. With the permission of the Court, the parties agree to wait until after the matter has been remitted back to

the trial court, or until after the time to appeal has expired, before they seek their costs and/or to file motions to tax such costs.

4. Since the February 7, 2007 Order and the above-stated Stipulation completely dispose of this action, it is appropriate to enter Judgment in this matter.

DATED: May 14, 2007

GIRARDI | KEESE

/s/ [Illegible]
SHAHRAM A. SHAYESTEH
Attorneys for PLAINTIFFS
DELBERT WILLIAMSON,
ALEXA WILLIAMSON,
and ESTATE OF THANH
WILLIAMSON

DATED: May, ____, 2007

BOWMAN AND BROOKE LLP

ROBERT S. ROBINSON
Attorneys for Defendants
MAZDA MOTOR COR-
PORATION and MAZDA
MOTOR OF AMERICA, INC.

TO THE COURT, ALL PARTIES, AND TO THEIR ATTORNEYS OF RECORD:

IT IS HEREBY STIPULATED by and between the parties through their respective attorneys as follows:

1. On February 7, 2007, the Court entered an Amended Order sustaining Defendant Mazda Motor Corporation's Demurrer to Plaintiffs' Third Amended Complaint. This Order dismissed, without leave to amend, all of Plaintiffs' claims arising out of the death of Thanh Williamson, including their wrongful death claims and *Dillon v. Legg* claims.

2. Plaintiff's' remaining claims arise out of their own personal injuries from the subject accident. As to those claims, the parties hereby stipulate to dismiss those claims with prejudice.

3. The parties also stipulate to defer the issue of recovery of costs arising out of Plaintiffs' claims until after Plaintiffs have resolved their appeal of this judgment or the time to file an appeal has expired. With the permission of the Court, the parties agree to wait until after the matter has been remitted back to the trial court, or until alter the time to appeal has expired, before they seek their costs and/or to file motions to tax such costs.

4. Since the February 7, 2007 Order and the above-stated Stipulation completely dispose of this action, it is appropriate to enter Judgment in this matter.

DATED: May ___, 2007

GIRARDI | KEESE

SHAHRAM A. SHAYESTEH
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ALEXA WILLIAMSON,
and ESTATE OF THANH
WILLIAMSON

DATED: May, 14, 2007

BOWMAN AND BROOKE LLP

/s/ [Illegible]
ROBERT S. ROBINSON
Attorneys for Defendants
MAZDA MOTOR COR-
PORATION and MAZDA
MOTOR OF AMERICA, INC.

JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE STIPULATION AND DEFENDANTS ARE AWARDED THEIR COSTS IN THE AMOUNT OF $_____.__.

DATED: JUN 18 2007

MICHAEL BRENNER
Honorable Michael Brenner

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COUNTY OF ORANGE

DELBERT WILLIAMSON; ALEXA WILLIAMSON, through her Guardian Ad Litem Delbert Williamson; ESTATE OF THANH WILLIAMSON, through her Survivors, Delbert Williamson and Alexa Williamson, Plaintiffs, vs. MAZDA MOTOR OF AMERICA, INC., FORD MOTOR COMPANY,	**CASE NO. 04CC06494** Hon. Michael Brenner (Dept. C-20) ~~{PROPOSED}~~ **ORDER FOR ENTRY OF JUDGMENT** (Filed Jun 18, 2007) Complaint filed: July 7, 2004 Trial date: August 7, 2006

AUTOMATIC EQUIPMENT MANUFACTURING COMPANY, MAZDA MOTOR CORPORATION, and DOES 1-100, inclusive,

Defendants.

Pursuant to stipulation of the parties and good cause appearing therefore,

IT IS HEREBY, ORDERED that judgment is hereby entered in accordance with the above Stipulation and that Defendants are awarded their costs in the amount of $ _____.____.

DATED: JUN 18 2007

MICHAEL BRENNER
Honorable Michael Brenner

Supreme Court, U.S.
FILED
JUL 30 2010
OFFICE OF THE CLERK

No. 08-1314

IN THE
Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,
Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*,
Respondents.

On a Writ of Certiorari to the
California Court of Appeal,
Fourth Appellate District, Division Three

PETITIONERS' BRIEF

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July 2010

130 60

QUESTION PRESENTED

The National Traffic and Motor Vehicle Safety Act of 1966 directs the Department of Transportation to issue federal motor vehicle safety standards, 49 U.S.C. § 30111(a), defines the safety standards as "minimum" standards, 49 U.S.C. § 30102(a)(9), and provides that compliance with a minimum standard "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

Does the 1989 version of Standard 208, which allowed vehicle manufacturers to install either Type 1 lap-only or Type 2 lap/shoulder seatbelts in the aisle seating positions of passenger vans, impliedly preempt a state tort claim alleging that a manufacturer should have installed a Type 2 seatbelt in the aisle seating position of a passenger van manufactured in 1993?

PARTIES

Petitioners are Delbert and Alexa Williamson and the Estate of Thanh Williamson. Respondents are Mazda Motor Corporation and Mazda Motor Corporation of America, Inc. dba Mazda North American Operations.

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INTRODUCTION

Thanh Williamson was killed while riding in the second-row aisle seat of a Mazda minivan when it was struck head on by another vehicle. Her seat was equipped with a lap-only seatbelt, which caused fatal internal injuries when the impact of the collision caused her body to jackknife over the belt. After her death, Mrs. Williamson's family brought suit against Mazda, alleging that the van was defective because it lacked a lap/shoulder belt for the aisle seat. When the minivan was manufactured and sold, the relevant federal safety standard allowed but did not require that seat to have a lap/shoulder belt. The question here is whether the Williamsons' damages claim is barred by implied conflict preemption, on the theory that holding Mazda accountable for failing to install a lap/shoulder belt would pose an obstacle to the federal safety standard in effect at the time.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Three is reported at *Williamson v. Mazda Motor of America, Inc.*, 84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008). The final opinion is reproduced in the Petition Appendix at pages 1-27. An order modifying an earlier version of the opinion is reproduced in the Petition Appendix at pages 28-30. The California Supreme Court's order denying discretionary review is unreported and is reproduced in the Petition Appendix at page 31.

JURISDICTION

The judgment of the California Court of Appeal was entered on October 22, 2008. The California Supreme Court denied discretionary review on February 11, 2009.

The petition for a writ of certiorari was timely filed on April 22, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The principal constitutional, statutory, and regulatory provisions involved in this case are the Supremacy Clause, U.S. Const. art. 6, cl. 2, the Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*, and the 1989 version of Federal Motor Vehicle Safety Standard 208. 54 Fed. Reg. 46,257, 46,266-69 (Nov. 2, 1989). The text of the pertinent provisions is set out at pages 1-3 of the petition for writ of certiorari.

STATEMENT OF THE CASE

A. The Safety Act

In 1966, Congress enacted the Motor Vehicle Safety Act. 49 U.S.C. § 30101 *et seq.*[1] As its title confirms, the purpose of the Safety Act is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 49 U.S.C. § 30101. "[T]he Motor Vehicle Safety Act was necessary because the industry was not sufficiently responsive to safety concerns." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983). "Congress intended safety to be the preeminent factor under the Motor Vehicle Safety Act." *Id.* at 55.

Congress placed responsibility for implementing the Safety Act with the Secretary of Transportation at the Department of Transportation (DOT). *See, e.g.*, 49 U.S.C.

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[1]The Safety Act was originally codified at 15 U.S.C. § 1381 *et seq.* In 1994, the Safety Act was recodified without substantive change. This brief refers to the current version of the statute.

§§ 30111(a), 30117(a). The Secretary, in turn, delegated that authority to the Administrator of the National Highway Traffic Safety Administration (NHTSA), a unit of DOT. 49 C.F.R. §§ 1.3(b)(4), 1.50(a).

One of NHTSA's most important responsibilities under the Safety Act is the promulgation of Federal Motor Vehicle Safety Standards (FMVSS). The Safety Act defines a "safety standard" as a "*minimum standard* for motor vehicle or motor vehicle equipment performance," 49 U.S.C. § 30102(a)(9) (emphasis added), and specifies that each standard "shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." *Id.* § 30111(a). NHTSA has promulgated safety standards for a wide variety of vehicle components and related equipment, including controls and displays, brake systems, rearview mirrors, head restraints, window glazing, and door locks. *See generally* 49 C.F.R. Part 571.

Subject to limited exceptions, the Safety Act prohibits the manufacture, sale, or delivery of any new motor vehicle or motor vehicle equipment that does not comply with the minimum safety standards. 49 U.S.C. § 30112(a). The Act authorizes DOT to seek remedies against manufacturers for noncompliance with the safety standards or other defects relating to motor vehicle safety. *Id.* §§ 30118-30120. The available remedies include requiring manufacturers to repair or replace vehicles or their component parts. *Id.* § 30120(a). The Act also authorizes the agency to bring civil enforcement actions and to seek civil penalties for noncompliance. *Id.* §§ 30121, 30163, 30165.

The Safety Act includes a "savings clause" that provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." *Id.* § 30103(e). As

explained in the House Report, the savings clause "specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of the parties under common law, particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 89-1776 at 24 (1966); *see also* S. Rep. No. 89-1301 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 ("[T]he federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law.").

The Safety Act also contains an express preemption provision, 49 U.S.C. § 30103(b)(1), which provides that, when a FMVSS is in effect, a state "may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter." As this Court has held, this provision preempts certain state statutes and regulations, but does not preempt state-law damages actions. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867-68 (2000). Mazda does not argue that the express preemption provision applies here.

B. Seatbelt Regulations Under Standard 208

In 1967, NHTSA adopted the first set of federal motor vehicle standards pursuant to the Safety Act. 32 Fed. Reg. 2,408 (Feb. 3, 1967). In the preamble to the final rule, NHTSA made "findings" that defined each standard as a "minimum standard" for motor vehicle or equipment performance. *Id.*

Standard 208—now entitled "Occupant Crash Protection"—was among the standards issued in 1967 and origin-

ally covered only manual seatbelts in passenger vehicles. The initial version of Standard 208 (also known as FMVSS 208) allowed manufacturers to install either lap-only (Type 1) or lap/shoulder (Type 2) seatbelts in all *rear* seating positions, but required Type 2 lap/shoulder seatbelts in the *front* "outboard" seating positions.[2] *Id.* at 2,415.

In 1982, two researchers at the University of Michigan Transportation Research Institute filed a petition with NHTSA to require Type 2 lap/shoulder belts in rear outboard seating positions. 49 Fed. Reg. 15,241 (Apr. 18, 1984). "[T]he primary reason for their request was enhancing child safety, by facilitating the use of booster seats in the rear seat." 53 Fed. Reg. 47,982 (Nov. 29, 1988). Because in 1984 at least fifty percent of child restraint systems (such as infant seats) then in use were anchored with a tether, NHTSA denied the petition based on its belief that child restraint systems equipped with a tether anchorage would offer greater protection than those held in place by Type 2 seatbelts. 49 Fed. Reg. at 15,241. At the same time, however, the agency acknowledged a growing trend away from tethered restraint systems. *Id.* In fact, according to the petition, only three of the twenty-five models of child restraints then on the market (as opposed to those still in use) required the use of tethers. *Id.*

In 1986, the National Transportation Safety Board (NTSB) issued a series of safety recommendations

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[2]An "outboard" seating position is defined as one less than 12 inches from the side interior wall of the vehicle. 49 C.F.R. § 571.3(b).

regarding lap-only seatbelts.[3] NTSB Safety Recommendations H-86-38 - H-86-49 (Aug. 8, 1986), http://www.ntsb.gov/recs/letters/1986. Based on its own study of vehicle crash data, NTSB found that lap-only seatbelts were capable of causing severe to fatal injuries to the head, spine, and abdomen "brought about by the violent jackknifing motion over the lap belt" in frontal collisions. NTSB Safety Recommendation H-86-44 - H-86-47, at 1-4 & n.3. NTSB concluded: "Lap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury; such systems appear to work effectively even for children, and they can be used with child safety seats and booster seats." *Id.* at 4. Accordingly, NTSB recommended that NHTSA adopt a rule requiring Type 2 seatbelts in rear outboard seating positions and, if technically feasible, in all other seating positions. *Id.* at 6-7.

In 1987, NHTSA revisited the issue of Type 2 seatbelts for rear seats in response to a petition by the Los Angeles Area Child Passenger Safety Association. 52 Fed. Reg. 22,818, 22,819 (June 16, 1987). This petition "again focused on the protection afforded to children riding in motor vehicles." 53 Fed. Reg. at 47,983. As NHTSA explained:

> The agency decided to grant the petition and reexamine this issue, because of two new factors. First, many States had adopted safety belt use laws, which led to an increase in belt use in the rear seat. Second, child restraint production had shifted

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[3]The NTSB is an independent federal agency with statutory responsibility to "propose corrective action to make the transportation of individuals as safe and free from risk of injury as possible, including action to minimize personal injuries that occur in transportation accidents." 49 U.S.C. § 1116(a)(2).

> away from those that were designed to have a tether anchored to the vehicle.

Id. Accordingly, in June 1987, the agency issued an Advance Notice of Proposed Rulemaking requesting comments on whether Type 2 seatbelts should be required in rear seating positions. 52 Fed. Reg. at 22,818-19. In November 1988, NHTSA issued a Notice of Proposed Rulemaking (NPRM) to amend Standard 208 by mandating Type 2 seatbelts in rear outboard seating positions. 53 Fed. Reg. at 47,982.

NHTSA identified several safety benefits associated with Type 2 seatbelts in rear seating positions. First, the agency estimated that Type 2 seatbelts were seven percent more effective in reducing fatalities and seventeen percent more effective in reducing moderate-to-severe injuries than Type 1 seatbelts. 52 Fed. Reg. at 22,820. Second, NHTSA concluded that requiring Type 2 seatbelts would increase rear seatbelt usage, because passengers were more likely to use them than Type 1 seatbelts. 53 Fed. Reg. at 47,983-84. Finally, NHTSA found that "[t]he presence of lap/shoulder belts in rear seating positions would help booster seats installed in rear seats to provide even more effective protection for child occupants, by allowing booster seats to use the shoulder belt to provide additional upper torso restraint." *Id.* at 47,984.

In proposing the new standard, NHTSA found no empirical support for questions raised by two commenters about the compatibility of child car seats and Type 2 seatbelts equipped with "emergency locking retractors" (ELRs), which hold the belt taut when pressure is exerted against it. *Id.* at 47,988. As summarized in the NPRM, "[t]he alleged problem of incompatibility between child car seats and ELRs is based on the fact that the ELR locks

only upon rapid occupant movement, vehicle deceleration, or impact." *Id.* Referring to earlier findings the agency had made on the safety of ELRs in 1985, NHTSA concluded that "'there are no data to show that low-speed movement of child safety seats is affecting the safety performance of child restraint devices in motor vehicle accidents.'" *Id.* (quoting 50 Fed. Reg. 46,056, 46,057 (Nov. 6, 1985)). Thus, the agency "tentatively determined that effective protection for both children and adults can be achieved without proposing any additional requirements for lap belt retractors." *Id.*

The agency summarized its overall findings regarding the effect of Type 2 seatbelts on child safety as follows:

> Accordingly, the agency believes that this proposal for rear seat lap/shoulder belts would offer benefits for children riding in some types of booster seats, would have no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts, and would offer older children the same incremental safety protection that would be afforded adult rear seat occupants.

Id. at 47,988-89.

NHTSA particularly emphasized the expected safety benefits of Type 2 seatbelts in the rear seating positions of passenger vans and minivans: "This type of vehicle represents a growing share of the market, so that the estimated safety benefits to rear seat occupants from lap/shoulder belts was greater than any other vehicle type, except passenger cars." *Id.* at 47,985. In addition, NHTSA explained, "these vehicles are frequently purchased because of their greater passenger-carrying capacity. Thus, it is reasonable for the agency to infer that

these vehicles will have a greater-than-average occupancy rate in the rear seats, with accompanying greater-than-average benefits from this proposed requirement." *Id.* at 47,985-86. NHTSA noted that "passenger vans, especially the newer 'mini-vans,' are frequently purchased to accommodate, and used for, the same family transportation purposes for which station wagons were used exclusively in the past." *Id.* at 47,986.

NHTSA ultimately promulgated the new Type 2 seatbelt requirements in two steps. First, in June 1989, NHTSA mandated Type 2 lap/shoulder seatbelts for the rear outboard seating positions of passenger cars manufactured on or after December 11, 1989. 54 Fed. Reg. 25,275, 25,278 (June 14, 1989). Although NHTSA had not yet completed its evaluation of comments pertaining to other types of vehicles, the agency decided it would be "unwise and inappropriate" to delay the safety benefits of a basic requirement for Type 2 seatbelts in rear outboard seats of passenger cars. *Id.* at 25,276 (rule issued in two steps "[t]o ensure the earliest possible implementation" of the requirement). Second, in November 1989, NHTSA finalized detailed aspects of the rule and expanded it to the rear outboard seats of all convertibles, light trucks, small buses, and multipurpose passenger vehicles manufactured on or after September 1, 1991. 54 Fed. Reg. 46,257 (Nov. 2, 1989). NHTSA emphasized that "[e]arlier compliance is also permitted and encouraged." *Id.* at 46,265.

NHTSA explained the rationale for the new rule as follows:

> Rear-seat lap/shoulder belts are estimated to be even more effective than rear-seat lap-only belts in reducing fatalities and moderate-to-severe injuries. As safety belt use in the rear seat of these vehicle

> types increases, the greater effectiveness of rear-seat lap/shoulder belts should yield progressively greater safety benefits. NHTSA also anticipates that this rule will achieve benefits by helping to increase safety belt use in rear seating positions of these vehicle types, by providing rear-seat occupants with maximum safety protection when they buckle up.

Id. at 46,257; *see also* 54 Fed. Reg. at 25,275. NHTSA estimated that "rear-seat lap-only belts only reduce the risk of death by 24-40 percent, while rear seat lap/shoulder belts reduce that risk by 32-50 percent." 54 Fed. Reg. at 46,257.

In issuing the final rule, NHTSA reiterated that the data on ELRs failed to show "that low-speed movement of child safety seats actually reduces to any extent the effectiveness of those seats in crashes." *Id.* at 46,261. Although the ELR safety concerns had "not been substantiated," the agency decided to counteract the *perception* of a safety issue by mandating an additional lockability requirement to allay public concerns and ensure that child safety seats would be tightly secured.[4] *Id.* at 46,262.

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[4]The lockability requirement mandated "that safety belts that incorporate an ELR in the lap belt or lap belt portion of a lap/shoulder belt shall provide some means other than an external device that requires manual attachment or activation that will prevent any further webbing from spooling out until that means is released or deactivated." 54 Fed. Reg. at 46,262. The agency received multiple petitions for reconsideration of the lockability requirement, which it responded to in subsequent proposals to modify the rule. 55 Fed. Reg. 30,937 (July 30, 1990); 56 Fed. Reg. 63,914 (Dec. 6, 1991). NHTSA adopted the final modified lockability rule in 1993. 58 Fed. Reg. 52,922 (Oct. 13, 1993).

When it finalized the 1989 standard, NHTSA decided against requiring Type 2 seatbelts for *center* rear seating positions. The agency explained "that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder benefits at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." 54 Fed. Reg. at 46,258; *see also* 53 Fed. Reg. at 47,984-85.

NHTSA also decided not to mandate lap/shoulder belts for the *aisle* seating positions of passenger vans, such as the Mazda minivan at issue here. NHTSA expressed agreement with General Motors' comment "that locating the anchorage for the upper end of the shoulder belt on the aisle side of the vehicle would stretch the shoulder belt across the aisleway and cause entry and exit problems for occupants of seating positions to the rear of the aisleway seating position." 54 Fed. Reg. at 46,258. However, NHTSA further stated: "Of course, in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with the aisleway's purpose of allowing access to more rearward seating positions, NHTSA encourages the manufacturers to do so." *Id.*

In adopting the final rules, NHTSA specifically addressed the requirements of Executive Order 12612. 54 Fed. Reg. at 46,265-66; 54 Fed. Reg. at 25,278. Issued by President Reagan in 1987, Executive Order 12612 stated that "[a]ny regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated." 52 Fed. Reg. 41,685 (Oct. 26, 1987).

Section 6(b) required agencies to prepare a Federalism Assessment whenever a proposed regulation had "sufficient federalism implications," *id.* at 41,687, which were defined to include "any substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." *Id.* NHTSA expressly concluded that the 1989 seatbelt rule did "not have sufficient federalism implications to warrant the preparation of a Federalism Assessment" pursuant to Executive Order 12612. 54 Fed. Reg. at 46,265-66; 54 Fed. Reg. at 25,278.

The 1989 amendments to Standard 208 were in effect when Mazda manufactured the Williamsons' 1993 minivan.

In December 2002, President George W. Bush signed "Anton's Law," which required NHTSA to issue a new rule mandating installation of Type 2 seatbelts in *all* rear seating positions of specified passenger vehicles. Pub. L. No. 107-318, § 5, 116 Stat. 2772 (2002), 49 U.S.C. § 30127, note. In 2004, NHTSA issued a new rule requiring Type 2 seatbelts in all rear seating positions of passenger vehicles manufactured on or after September 1, 2007. 69 Fed. Reg. 70,904 (Dec. 8, 2004). NHTSA stated that the 2004 rule was "not intended to preempt state tort civil actions" except in one narrowly defined area not relevant here. *Id.* at 70,912.

C. The *Geier* Decision

Geier v. American Honda Motor Co., 529 U.S. 861 (2000), arose from injuries sustained by the driver of a 1987 Honda. The driver filed a damages claim under state common law alleging that her vehicle was defective because the front driver's seat was not equipped with an airbag. In contrast to this case, *Geier* did not involve the

1989 version of Standard 208 governing manual seatbelts in rear seating positions. Rather, at issue in *Geier* was the portion of the 1984 version of Standard 208 governing "passive restraints" in front seating positions.[5] The question presented was whether the state common-law claims were preempted, either expressly or impliedly, by the Safety Act and Standard 208.

The Court first held that the express preemption clause of the Safety Act, 49 U.S.C. § 30103(b)(1), did *not* preclude state tort liability. Based on the savings clause, 49 U.S.C. § 30103(e), the Court adopted a "narrow reading" of the express preemption clause "that excludes common-law actions." *Geier*, 529 U.S. at 868. The Court found that the savings clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870. At the same time, the Court ruled that the savings clause did not foreclose "the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as preempting state laws (including common-law rules) that 'actually conflict' with the statute or federal standards promulgated thereunder." *Id.* at 869. Accordingly, the Court found that a state common-law claim relating to vehicle safety would be preempted if it "prevent[ed] or frustrate[d] the accomplishment of a federal objective" or "ma[d]e it impossible for private

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[5] "Passive restraints" are "devices that do not depend for their effectiveness on any action by the vehicle occupant," such as "airbags and automatic seatbelts." *Geier*, 529 U.S. at 889-90 (Stevens, J., dissenting). Seatbelts that must be fastened manually are not passive restraints. *Id.* at 880 (distinguishing between "ordinary manual lap and shoulder seat belts" and "passive restraints").

parties to comply with both state and federal law." *Id.* at 873-74.

Finally, the Court considered whether Geier's state tort claim conflicted with the 1984 version of Standard 208. *Id.* at 874-87. Although the *Geier* majority agreed with the dissent's position "that a court should not find pre-emption too readily in the absence of clear evidence of a conflict," *id.* at 885, it found clear evidence that Geier's suit would stand as an obstacle to the objectives of the passive restraint regulations contained in the 1984 version of Standard 208.

Relying primarily on "DOT's own contemporaneous explanation" of "the 1984 version of FMVSS 208" as expressed in the Federal Register, *id.* at 877, the Court focused on three unique features of the 1984 passive restraint regulations. First, the 1984 regulations were intended to promote a wide "variety" of passive restraints to encourage the industry to develop "alternative, cheaper, and safer passive restraint systems." *Id.* at 878-79. Second, the 1984 regulations "deliberately sought a *gradual* phase-in of passive restraints" to give manufacturers time to develop better systems and to prevent a public backlash against airbags. *Id.* at 879. Third, the "passive restraint requirement was conditional" because "DOT believed that ordinary manual lap and shoulder belts would produce about the same amount of safety as passive restraints and at significantly lower costs—*if only auto occupants would buckle up.*" *Id.* at 880 (emphasis in original). Thus, the regulation provided for rescission of the passive restraint requirements if two-thirds of the States adopted mandatory seatbelt buckle-up laws by September 1, 1989. *Id.*

The Court concluded that Geier's tort claim conflicted with these three regulatory objectives. First, Geier's claim "that, to be safe, a car must have an airbag," *id.* at 886—and that state common law therefore imposed a duty to install airbags—"presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. Second, Geier's vehicle was manufactured during the initial phase-in period when the 1984 regulation "required only that 10% of a manufacturer's nationwide fleet be equipped with any passive restraint device at all." *Id.* Thus, Geier's claim that *all* vehicles manufactured during this period should have been equipped with airbags "would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Id.* Finally, such a requirement "could have made less likely the adoption of a state mandatory buckle-up law." *Id.*

In holding Geier's claims impliedly preempted, the Court gave considerable weight to DOT's longstanding view that airbag tort claims would interfere with the objectives of the 1984 passive restraint regulations, as expressed by the Government in three amicus briefs dating back to 1990. *Id.* at 883 (citing amicus briefs for United States). The Court noted: "The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Id.*

From the very first sentence of the opinion, the Court repeatedly emphasized that its ruling was based solely on the *passive restraint* provisions of the *1984 version* of Standard 208. *Id.* at 864 ("This case focuses on the 1984 version" of Standard 208 regarding "passive restraints"); *id.* at 874-75 (citing 1984 DOT statements in the Federal Register "which accompanied the promulgation of FMVSS

208"); *id* at 877 (referring to "the version [of Standard 208] that is now before us"); *id.* at 877 (referring to "DOT's own contemporaneous explanation of ... the 1984 version of FMVSS 208"); *id.* at 879 (referring to "[t]he 1984 FMVSS 208 standard" on "passive restraints"); *id.* at 881 (summarizing the purpose of "the 1984 version of FMVSS 208"); *id.* at 886 (referring to "the contemporaneous 1984 DOT explanation" of its passive restraints regulation). The Court explicitly limited its holding to "'no airbag' lawsuits." *Id.* at 866.

Justice Stevens dissented, joined by Justices Souter, Thomas, and Ginsburg. The four dissenting Justices agreed with the majority that the express preemption clause does not apply to common-law tort claims. *Id.* at 896-99 (Stevens, J., dissenting). However, they disagreed with the majority's holding that Geier's tort claim was impliedly preempted because it interfered with the objectives of the 1984 passive restraint regulations. *Id.* at 899-913 (Stevens, J., dissenting); *see also Wyeth v. Levine*, 129 S. Ct. 1187, 1214 (2009) (Thomas, J., concurring) (expressing view that *Geier* "conflicted with the plain statutory text of the saving clause within the Safety Act, which expressly preserved state common-law actions").

D. Factual Background and Proceedings Below

On August 14, 2002, Delbert Williamson and his wife, Thanh Williamson, were traveling with their daughter Alexa in their 1993 Mazda MPV Minivan. Mr. Williamson was driving, Mrs. Williamson was seated in the right-hand aisle seat of the middle row, and Alexa was seated immediately to her left. Mr. Williamson and Alexa were both wearing Type 2 lap/shoulder seatbelts installed in their seating positions. Mrs. Williamson was wearing the

Type 1 lap-only seatbelt installed in the aisle seat of the minivan.[6] JA 32-33, 44-45, 68-69, 72-73, 206, 209-10.

A motor home towing a Jeep Wrangler was traveling in the opposite direction. Suddenly, the Jeep Wrangler became detached from the motor home, crossed into oncoming traffic, and struck the Williamsons' van. Mrs. Williamson was killed when the forces of the collision caused her body to jackknife around her Type 1 lap-only seatbelt, resulting in severe abdominal injuries and internal bleeding. JA 32-34, 44-45, 72-73, 206, 209-10. Mrs. Williamson's injuries were consistent with "something physicians call seat belt syndrome, when a passenger restrained by only a lap belt jackknifes over at the waist due to the force of the collision." *Karlsson v. Ford Motor Co.*, 45 Cal. Rptr. 3d 265, 269 (Cal. Ct. App. 2006) (affirming product liability verdict against Ford for failure to install Type 2 seatbelt in rear center seating position of 1986 minivan). Mr. Williamson and Alexa suffered non-fatal injuries. JA 44, 72, 206, 210.

Mrs. Williamson's survivors and her estate (the petitioners here) filed suit in California state court, asserting state tort claims including strict products liability and negligence. In addition to other claims not before this Court, they alleged that Mazda should have equipped Mrs. Williamson's seat with a Type 2 lap/shoulder belt to restrain the passenger's upper torso in a frontal collision. JA 33-36, 44-49, 72-80, 209-23.

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[6]The complaints did not specifically allege that Mrs. Williamson was seated in the aisle seat. However, Mazda has expressly conceded that she was. JA 176; Supp. Br. for Respondents at 6-8 & n.3 (filed May 4, 2010).

Petitioners' theory of liability is that when the Williamsons' minivan was manufactured in 1993, there were technologically feasible and cost-effective methods of installing Type 2 seatbelts in aisle seats without obstructing the aisle. Because the Type 1 seatbelt exposed passengers to a known risk of serious injury or death and did not perform as safely as an ordinary consumer would have expected at the time, Mazda had a common-law duty to install a Type 2 seatbelt in the aisle seating position. *See, e.g.*, Judicial Council of Cal. Civ. Jury Instructions, No. 1203 (strict liability for design defect under "consumer expectation" test), No. 1204 (strict liability for design defect under "risk-benefit" test), No. 1221 (negligence liability for failure to exercise reasonable care in designing product to avoid exposing others to foreseeable risk of harm).

In a motion for judgment on the pleadings and a subsequent demurrer, Mazda asserted that the Williamsons' state-law claims were preempted by Standard 208 because they conflicted "with the choice that federal law gave to manufacturers to choose which type of safety belt they would install in those center seats." JA 107. According to Mazda, *Geier* broadly "held that FMVSS 208 preempts state-law claims based on an exercise of options granted by FMVSS 208." JA 108; *see also* JA 113-20, 170-72, 177, 281-83, 340.

The trial court ultimately sustained Mazda's demurrer without leave to amend as to all of petitioners' claims arising out of Mrs. Williamson's death. JA 375. After Mr. Williamson and Alexa stipulated to the dismissal of their own personal injury claims and entry of a final judgment, JA 377-83, petitioners appealed the judgment to the California Court of Appeal. On appeal, Mazda again argued that "when a safety standard grants a choice

between two specified equipment options, neither of which is described as a 'minimum,' a state court suit eliminating that choice creates a direct conflict." Respondents' Br. in Cal. Ct. App. at 22 (filed Apr. 3, 2008). Mazda stated that "'*Geier* confirms ... that a state lawsuit that forecloses an option left open by FMVSS 208 is in fact preempted.'" *Id.* at 23 (quoting *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000)). Mazda also claimed that the lawsuit would interfere with other federal objectives, including NHTSA's asserted "policy promoting compatibility with child restraint systems." *Id.* at 37.

The California Court of Appeal affirmed the judgment and found the Williamsons' lawsuit to be preempted under *Geier* "because it conflicts with FMVSS 208." Pet. App. 2. The court followed a line of federal and state appellate cases broadly construing *Geier* as holding "that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted." *Hurley*, 222 F.3d at 383; *accord Carden v. Gen. Motors Corp.*, 509 F.3d 227, 230-31 (5th Cir. 2007); *Griffith v. Gen. Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002); *Heinricher v. Volvo Car Corp.*, 809 N.E.2d 1094, 1098 (Mass. App. Ct. 2004). The court concluded: "[T]hese cases have almost uniformly found FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option and we find their analysis to be persuasive." Pet. App. 24.

> In effect, [plaintiffs] seek to hold defendants liable for choosing the lap-only seatbelt option for a rear inboard seat position. If successful, plaintiffs' claim would bar motor vehicle manufacturers from employing one of the passenger restraint options authorized by FMVSS 208 because it would

> effectively require them to install lap/shoulder seatbelts at inboard seating positions to avoid liability under California law. Such a result would 'stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208' [citation] and is therefore preempted.[7]

Pet. App. 23, 29. Quoting excerpts from this same line of authorities, the California Court of Appeal also identified several other asserted reasons why NHTSA's 1989 decision not to mandate Type 2 seatbelts for rear inboard seating positions preempted petitioners' common law claims, such as a supposed issue involving child safety and NHTSA's supposed interest in promoting a mix of seatbelt types. Pet. App. 17-18.

Petitioners filed a petition for review in the California Supreme Court solely on the federal preemption issue, which was denied on February 11, 2009.

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[7] In its original opinion, the court referred to Mrs. Williamson's seat as a "center" seat. After petitioners filed a petition for rehearing to reiterate that it was an aisle seat, the court modified its opinion to substitute the word "inboard" for "center" in all of the references to Mrs. Williamson's seating position. Pet. App. 28-29. The version of the final opinion contained in the Petition Appendix mistakenly includes the original unmodified language of one sentence beginning "In effect." *See* Pet. App. 23, 29. This sentence is quoted in its final modified form in the text accompanying this footnote.

SUMMARY OF ARGUMENT

1. When it enacted the Safety Act in 1966, Congress made a deliberate decision to allow state common law to operate concurrently with federal minimum safety standards to achieve the preeminent goal of vehicle safety. The case for implied conflict preemption is particularly weak where Congress has expressly stated its intent to allow state tort law to complement federal regulations. To overcome the strong presumption against preemption, there must be clear evidence of an irreconcilable conflict between petitioners' common-law claims and NHTSA's regulation. Here, there is no such evidence of any conflict between the relevant 1989 version of Standard 208 and the common-law theory asserted by the Williamsons.

2. The California Court of Appeal and several other lower courts have misconstrued *Geier* as holding that whenever a FMVSS offers a choice of options for complying with the minimum regulatory standard, a common-law claim challenging a manufacturer's choice is preempted. This reading is not supported by the Court's opinion and runs counter to NHTSA's longstanding position as expressed in amicus briefs dating back to 1990—the very same amicus briefs on which this Court relied in *Geier*. The lower courts' broad theory of implied preemption should be repudiated because it would effectively convert the federal safety floor into a liability ceiling and defeat the scheme of cooperative federalism embodied in the Safety Act.

This Court's finding of implied obstacle preemption in *Geier* was based on the unique regulatory history and specific policy objectives of the parts of the *1984* version of Standard 208 governing *passive* restraints in *front* seating positions. By contrast, this case involves the parts of the

1989 version of Standard 208 governing *manual seatbelts* in *rear* seating positions. The agency's 1984 objectives with respect to passive restraints have no relevance to the 1989 rule governing Type 2 seatbelts in rear seating positions. Petitioners' claim that Mazda should have installed a Type 2 seatbelt in the aisle seating position of a passenger van manufactured in 1993 is fully consistent with NHTSA's objectives as expressed in both the 1989 version of Standard 208 and its regulatory history.

When NHTSA enacted the 1989 rule, the agency explicitly encouraged manufacturers to find ways to design and install Type 2 seatbelts in the aisle seating positions of passenger vans without anchoring the shoulder belt to the side of the vehicle and obstructing the aisle. By 1993, there were technologically feasible ways of doing so. Petitioners' common-law claim supports and promotes NHTSA's policy of encouraging Type 2 seatbelts in the aisle seating positions of passenger vans.

NHTSA expressly concluded that the 1989 seatbelt rule did not have sufficient federalism implications to warrant preparing a Federalism Assessment pursuant to Executive Order 12612. This finding and the agency's contemporaneous interpretation of Executive Order 12612 support its current position that the 1989 seatbelt rule was not meant to preempt higher common-law standards.

As NHTSA has confirmed in its amicus brief at the petition stage, petitioners' tort claim would not frustrate any federal objective manifest in the 1989 seatbelt standard or its regulatory history. The Court should accord special weight to the agency's position that petitioners' lawsuit does not interfere with its own policy objectives.

3. The other factors cited by the California Court of Appeal do not support a finding of implied obstacle preemption. The issue of child safety had nothing to do with NHTSA's 1989 decision not to mandate Type 2 seatbelts for center and aisle seating positions; *Geier* was not based on the "comprehensiveness" of Standard 208; NHTSA did not believe that promoting a mix of seatbelt types would increase rear seatbelt use; and petitioners' common-law theory would not pose an obstacle to any technological innovation that NHTSA was encouraging.

ARGUMENT

I. TO OVERCOME THE PRESUMPTION AGAINST PREEMPTION, THERE MUST BE CLEAR EVIDENCE THAT PETITIONERS' COMMON-LAW CLAIMS WOULD INTERFERE WITH THE OBJECTIVES OF STANDARD 208.

This case is governed by the strong presumption against preemption that this Court has repeatedly applied in cases involving the States' historic role in protecting the health and safety of their citizens and providing an avenue for tort victims to seek compensation for injuries. *See, e.g.*, *Wyeth*, 129 S. Ct. at 1194-95; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). To avoid federal encroachment on powers Congress intended to reserve to the States, the Court begins with the assumption that federal law does not supersede state law "'unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002) (finding Congress expressed no "clear and manifest" intent to preempt state common-law claim relating to boat safety). "We rely on the presumption because respect for the States as 'independent sovereigns

in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Wyeth*, 129 S. Ct. at 1195 n.3 (quoting *Lohr*, 518 U.S. at 485). As this Court confirmed in *Wyeth*, this presumption applies to claims of implied conflict preemption. *Id.* (citing *California v. ARC Am. Corp.*, 490 U.S. 93, 101-02 (1989); *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985)).

Thus, here, Mazda must establish the existence of a conflict between federal and state law "strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough Cty.*, 471 U.S. at 716. "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *ARC Am. Corp.*, 490 U.S. at 105. As Justice Kennedy has emphasized: "Our decisions establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring). "Any conflict must be 'irreconcilable.... The existence of a hypothetical or potential conflict is insufficient ....'" *Id.* (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)). "The Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict'.... The 'teaching of this Court's decisions ... enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960)).

"The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has

nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)); *accord Wyeth*, 129 S. Ct. at 1200. A prime example is when Congress enacts a statute that authorizes a federal agency to establish "minimum" safety standards, but also includes a savings clause to preserve the ordinary operation of state common law. *See, e.g.*, *Sprietsma*, 537 U.S. at 57-59 (discussing Federal Boat Safety Act).[8]

The Motor Vehicle Safety Act fits this profile exactly. By including the savings clause, 49 U.S.C. § 30103(e), and by defining the federal motor vehicle safety standards as only "minimum" standards, 49 U.S.C. § 30102(a)(9), Congress manifested a deliberate decision to allow state common law to operate concurrently with the federal regulatory standards to achieve the preeminent goal of vehicle safety. "Congress sought to meet its goal of minimizing the number of deaths and injuries caused by auto accidents by setting forth minimum standards *and leaving common law liability in place*." *Perry v. Mercedes Benz*

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[8]Even when Congress preempts state regulation, it is "perfectly rational for Congress not to preempt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims." *Sprietsma*, 537 U.S. at 64; *see also Silkwood*, 464 U.S. at 257-58 (holding state tort suit for plutonium contamination at nuclear facility did not frustrate objectives of Atomic Energy Act because Congress intended "to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Silkwood to recover for injuries caused by nuclear hazards").

of N. Am., Inc., 957 F.2d 1257, 1265-66 (5th Cir. 1992) (emphasis added). Thus, when NHTSA issues safety standards, it does so under the authority of a statute that expressly preserves state common-law claims imposing higher standards than the federal safety floor. *See* 49 U.S.C. § 30103(e). Where, as here, there is no "clear evidence of a conflict," *Geier*, 529 U.S. at 885, a finding of implied preemption would undermine the scheme of cooperative federalism embodied in the Safety Act and run counter to the preemption principles repeatedly stated by this Court.

II. PETITIONERS' COMMON-LAW CLAIMS DO NOT CONFLICT WITH THE 1989 VERSION OF STANDARD 208 ADDRESSING SEATBELTS IN REAR SEATING POSITIONS.

Geier expressly held that the Safety Act's savings clause *preserves* common-law actions seeking to establish greater vehicle safety than a regulatory standard setting a safety floor. *Geier*, 529 U.S. at 868-70. Contrary to the holdings of some lower courts, *Geier* did *not* hold that mere compliance with an option permitted by one of NHTSA's minimum safety standards is sufficient to preempt state common law.

Unlike the airbag claim in *Geier*, petitioners' seatbelt claims would not stand as an obstacle to any federal policy objective manifested by NHTSA in the applicable *1989* version of Standard 208 or its regulatory history. To the contrary, this lawsuit is fully consistent with NHTSA's goal of encouraging manufacturers to install Type 2 seatbelts in the aisle seating positions of passenger vans. None of the 1984 federal policy objectives on passive restraints at issue in *Geier* has any relevance to the 1989 seatbelt rule at issue here. Thus, there is no conflict

between petitioners' common-law claims and the 1989 version of Standard 208 applicable to this case.

A. A Manufacturer's Compliance With One of the Regulatory Options Permitted by a Federal Motor Vehicle Safety Standard Is Not Sufficient to Preempt State Common Law.

1. In finding that petitioners' tort claims were preempted, the California Court of Appeal followed a line of cases that has broadly construed *Geier* as holding that whenever a federal motor vehicle safety standard offers a choice of equipment options, a state common-law claim against a manufacturer for installing one of those options as opposed to another is preempted. *See supra* pp. 19-20. However, nothing in the *Geier* opinion supports such a broad theory of implied obstacle preemption. If the mere existence of regulatory options were sufficient to preempt state common law, it would have been a simple matter for the Court to say so. Instead, the Court conducted a detailed analysis of the agency's specific policy reasons for adopting the 1984 passive restraints regulation. The Court found that the plaintiff's airbag claim was preempted because it posed an obstacle to the agency's policy objectives as expressed in the 1984 regulatory history, *not* because of the mere fact that the manufacturer had complied with one of the restraint options permitted by Standard 208. *Geier*, 529 U.S. at 877-88.

Geier neither holds nor suggests that mere compliance with one of several options permitted by a safety standard exempts a manufacturer from common-law liability for choosing an option that is less safe than another. Such a result would defeat the statutory scheme enacted by Congress. Even when a motor vehicle safety standard provides options for compliance, it is still by definition only

a "minimum standard," 49 U.S.C. § 30102(a)(9), as NHTSA confirmed when it first promulgated Standard 208 and gave manufacturers the option of installing either Type 1 or Type 2 seatbelts in rear seating positions. 32 Fed. Reg. at 2,408 (stating that "all standards" are only "minimum standard[s]"). These minimum standards "specify a floor, not a ceiling, for performance. They are intended to allow manufacturers flexibility in the selection of means of compliance." 63 Fed. Reg. 3,654, 3,656 (Jan. 26, 1998) (explaining why new safety standards on rear impact guards did not preempt state tort law).

Taken to its logical conclusion, the theory that a manufacturer's compliance with an option permitted by a FMVSS precludes state-law liability would swallow the general rule that a FMVSS is a minimum standard that does not foreclose state-law liability. By definition, *all* minimum standards give a manufacturer an option either to satisfy the minimum or exceed it. Opting among multiple choices given by a regulation is no more or less deserving of protection from liability than opting for the bare minimum rather than exceeding it.[9]

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[9] In addition to Standard 208, numerous other safety standards promulgated by NHTSA give vehicle manufacturers several options for compliance. *See, e.g.*, 49 C.F.R. § 571.105 at S5.1.3; *id.* § 571.202 at S4.1; *id.* § 571.121 at S5.6(a)(1); *id.* § 571.105 at S5.1.3; *id.* § 571.108 at S6.4.3; *id.* § 571.401 at S4.1; *id.* § 571.201 at S6.1; *id.* § 571.214 at S6; *id.* § 571.217 at S5.2.3.1. In fact, there are so many different safety standards providing options for compliance that NHTSA has addressed the issue in a general provision entitled "Explanation of usage." 49 C.F.R. § 571.4 (explaining that the phrase "at the option of the manufacturer" as used in the safety standards "clearly indicates that the selection of items is at the manufacturer's option"). The agency has never suggested that a safety standard providing different options for compliance has any

(continued...)

If federal law preempted any state tort suit based on a manufacturer's exercise of an option permitted by a minimum safety standard, it would effectively convert the federal safety floor created by Congress into a national liability ceiling. That result cannot be what Congress had in mind when it defined the motor vehicle safety standards as "minimum standard[s]," 49 U.S.C. § 30102(a)(9), and dictated that "[c]ompliance with a motor vehicle safety standard ... does not exempt a person from liability at common law." *Id.* § 30103(e). "[A]s *Geier*'s interpretation of the savings clause makes clear, a uniform *minimum* safety standard is not normally intended to preempt more stringent common law requirements." *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398, 402 (8th Cir. 2000) (emphasis in original) (holding common-law claim for absence of reflective tape on rear of trailer was not impliedly preempted even though manufacturer had complied with FMVSS 108 on reflective devices); *see also O'Hara v. Gen. Motors Corp.*, 508 F.3d 753, 762-63 (5th Cir. 2007) (holding NHTSA's decision to give manufacturers option between laminated or tempered glass for side windows in FMVSS 205 did not preempt tort claim for failure to install laminated glass).

2. When it decided *Geier*, this Court was well aware of the broad theory of implied preemption endorsed by some lower courts. Before *Geier*, several circuits had already adopted this theory. *See Geier*, 529 U.S. at 866 (citing *Taylor v. Gen. Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989) (holding that state common law cannot impose liability for vehicle manufacturer's choice of any option permitted by FMVSS 208); *Pokorny v. Ford Motor Co.*,

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[9](...continued)
greater preemptive effect than any of its other safety standards.

902 F.2d 1116, 1124-25 (3d Cir. 1990) (following *Taylor*)). Yet *Geier* adopted a much narrower theory of implied conflict preemption consistent with DOT's longstanding position on the issue as expressed in amicus briefs dating back to 1990. *Id.* at 883. In each of those amicus briefs, DOT explained why a "no airbag" lawsuit would conflict with its specific policy objectives in promulgating the 1984 version of Standard 208 governing passive restraints. *Id.* (quoting amicus briefs for United States in *Geier*, 529 U.S. 861 (No. 98-1911), *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (No. 94-286), and *Wood v. Gen. Motors Corp.*, 494 U.S. 1065 (1990) (No. 89-46)). Because DOT had explained its position "consistently over time," this Court concluded that "the agency's own views should make a difference." *Id.*

In those very same amicus briefs, however, DOT consistently *rejected* the broad theory of implied preemption set forth in cases such as *Taylor* and *Pokorny*. For example, in a 1990 brief, the agency stated:

> Respondent argues that FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints. [Citations.] We disagree with this reasoning.... That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law.... If any design 'permitted' in this sense could not be the subject of a common law design defect claim, manufacturers would obtain by implication what Congress expressly denied them in [the savings clause]: immunity from common law liability by complying with minimum safety standards.

Br. for United States as Amicus Curiae at 15, *Wood*, No. 89-46.

Again, in *Freightliner Corp.*, the government stated:

> Although the majority of courts to have considered the question have concluded that 'no-airbag' suits are preempted, they have done so on a broader theory of implied preemption with which the United States does not agree, i.e., that the existence of 'options' to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option.

Br. for United States as Amicus Curiae Supporting Respondents at 28 n.16, *Freightliner Corp*, No. 94-286 (citing cases including *Taylor* and *Pokorny*).

And in *Geier* itself, the United States argued:

> [S]tate tort law does not conflict with a federal 'minimum standard' ... merely because state law imposes a more stringent requirement.... We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose.

Br. for United States as Amicus Curiae Supporting Affirmance at 21 & n.18, *Geier*, No. 98-1911.

Likewise, in this case, the agency has reaffirmed its longstanding position. In its amicus brief at the petition stage, the government expressed its views as follows:

> The reasoning of the decision below conflicts with the consistent position of the United States, expressed in three amicus briefs filed in this Court beginning in 1990. Those briefs maintained that a

> FMVSS permitting a manufacturer to choose among different options consistent with a minimum standard does not alone preempt state common-law tort claims seeking to impose liability for selecting one option instead of another.

Br. for United States at 16 (filed Apr. 23, 2010). "[W]ithout more (such as the emphasis on diversity of solutions discussed in *Geier*), the States are not foreclosed from concluding, through a duty of care applied in common-law tort actions, that one option is superior to the others." *Id.* at 19.

The significance of NHTSA's statements on this issue is not that the agency has any special expertise on the legal question of how to approach preemption. *See Wyeth*, 129 S. Ct. at 1201. Rather, NHTSA's statements are important because they demonstrate that, in the usual case, the agency does not perceive any conflict between the policy objectives it seeks to achieve by providing options for compliance with a FMVSS and state common-law claims challenging a choice of one of those options. "The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Geier*, 529 U.S. at 883; *see also Lohr*, 518 U.S. at 496 (giving "substantial weight" to FDA's views on preemptive effect of statute it was responsible for implementing and stating that "the agency is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"). Accordingly, here, as in *Geier*, DOT's consistently stated views as to the impact of state law on its own policies are entitled to "special weight." *Geier*, 529 U.S. at 886.

Where the responsible federal agency has never suggested that state law would interfere with its own objectives, this Court has emphasized that it is "reluctant" to find any threat to federal goals. *Hillsborough Cty.*, 471 U.S. at 721; *accord Geier*, 529 U.S. at 884. Where the agency has expressly disavowed any conflict between state law and its own policy objectives, or has disavowed the federal policy asserted by the party claiming preemption, the Court should be even more wary of finding an implied conflict. *See, e.g., Altria Group, Inc. v. Good*, 129 S. Ct. 538, 549 (2008) (noting that the Government "disavows" the policy asserted to have a preemptive effect); *Sprietsma*, 537 U.S. at 68 (relying on the fact that "the Solicitor General, joined by counsel for the Coast Guard, has informed us that the agency does not view the 1990 refusal to regulate or any subsequent regulatory actions by the Coast Guard as having any pre-emptive effect"). The Court's approach is a reflection of our system of separation of powers. Because courts have no authority to make law, they cannot imply preemption based on their own suppositions about federal policy objectives not clearly articulated in the applicable rule and its regulatory history. *See Wyeth*, 129 S. Ct. at 1205-08, 1214-16 (Thomas, J., concurring) (criticizing theories of obstacle preemption based on congressional and agency "musings" not contained within the text of federal law).

3. The view that compliance with a federal safety standard is not sufficient, in the usual case, to trigger preemption of state common law is also consistent with this Court's discussion of *Geier* in *Wyeth*. The issue in *Wyeth* was whether the FDA's approval of a drug and its label preempted a state common-law claim alleging that the manufacturer should have warned against a particular method of administering the drug. The three dissenting

Justices viewed *Geier* as controlling and described it as follows: "Because the Secretary [of Transportation] determined that a menu of alternative technologies was 'safe,' the doctrine of conflict pre-emption barred Geier's efforts to deem some of those federally approved alternatives 'unsafe' under state tort law." *Id.* at 1221 (Alito, J., dissenting). The dissent argued that the plaintiff in *Wyeth* was similarly attempting to deem a federally approved method of administering the drug as unsafe under state tort law. *Id.* However, the majority rejected this reading of *Geier* and described the holding in more narrow terms based on the interference with the agency's "plan to phase in a mix of passive restraint devices," the "DOT's contemporaneous record," and "the agency's explanation of how state law interfered with its regulation." *Id.* at 1203. Thus, *Wyeth* rejected the notion that a state common-law claim is preempted whenever it challenges a manufacturer's choice of an option permitted by a federal regulation. If anything, the case for preemption is even weaker in this case, because the federal statute in *Wyeth* did *not* define the FDA's actions as "minimum" standards and did *not* contain a savings clause. *See id.* at 1221-22 (Alito, J., dissenting).

It would be extraordinary for this Court to hold that simply by offering manufacturers different options for compliance with a minimum safety standard, NHTSA has unwittingly set a liability ceiling rather than a safety floor. Such a result would deprive the agency of the ability to set flexible minimum standards without preempting common law. Because the agency itself has never viewed its own options as having such a preemptive effect, and the agency's longstanding position on the issue is consistent with the intent of Congress as expressed in the Safety Act,

the Court should emphatically reject this broad theory of implied obstacle preemption.

B. The Passive Restraint Policies at Issue in *Geier* Have No Relevance to the Manual Seatbelt Claim at Issue Here.

In *Geier*, this Court based its finding of implied obstacle preemption on a detailed analysis of the regulatory history of the *1984* version of Standard 208 governing *passive* restraints in front seating positions.[10] Based on its independent examination of the 1984 rule and its regulatory history, and the consistently stated views of DOT as expressed in a series of amicus briefs dating back to 1990, the Court concluded that Geier's "all airbag" claim frustrated the agency's goal of achieving a *gradual* phase-in of a *variety* of different types of passive restraint devices adopted to prevent a public backlash against airbags and encourage the industry to develop alternative passive restraint systems. *Geier*, 529 U.S. at 877-86; *see also Wyeth*, 129 S. Ct. at 1203 (explaining that Geier's "all airbag" claim posed an obstacle to the agency's call "for a gradual phase-in of a mix of passive restraints in order to spur technological development and win consumer acceptance" as expressed in "the rule itself and the DOT's contemporaneous record, which revealed the factors the agency had weighed and the balance it had struck").

The agency objectives identified by the Court in *Geier* have no relevance to the seatbelt claim at issue here. Unlike *Geier*, this case does not involve the parts of the

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[10] The passive restraints regulation at issue in *Geier* did not apply to rear seating positions. 49 Fed. Reg. 28,962, 28,963 (July 17, 1984) ("Rear seats are not covered by the requirements for automatic protection.")

1984 version of Standard 208 governing passive restraints in front seating positions. Rather, it involves the parts of the 1989 version of Standard 208 governing manual seatbelts in rear seating positions. In contrast to the 1984 rulemaking on passive restraints, NHTSA's 1989 rulemaking on Type 2 seatbelts does *not* reveal the existence of any preemptive federal policy of the type at issue in *Geier*.

First, unlike the 1984 passive restraint regulations, the 1989 seatbelt regulations were *not* intended to encourage a variety or mix of different seatbelt types. On the contrary, the 1989 regulations were based on NHTSA's explicit recognition that Type 2 lap/shoulder belts are "more effective than rear-seat lap only belts in reducing fatalities and moderate-to-severe injuries." 54 Fed. Reg. at 25,275; *accord* Br. for United States at 14 (filed Apr. 23, 2010) ("NHTSA was *not* seeking to promote safety by encouraging variety in seatbelt design or fostering a mix of Type 1 and Type 2 seatbelts.") (emphasis added). The agency neither suggested that vehicle occupants would be safer with a mix of Type 1 and Type 2 seatbelts, nor articulated any policy promoting a mix of manual seatbelt types.

In finding to the contrary, the California Court of Appeal quoted the following language from the Eleventh Circuit's opinion in *Griffith*: "'DOT intended and expected FMVSS 208 to produce a mix of restraint devices, *both passive and manual*, in cars and trucks.'" Pet. App. 18 (emphasis added) (quoting *Griffith*, 303 F.3d at 1281). However, neither the Eleventh Circuit nor the California Court of Appeal cited anything in the 1987-1989 regulatory history that supports this assertion. The California court only cited to *Griffith*, and *Griffith* only cited to *Geier*. *See Griffith*, 303 F.3d at 1281 (citing *Geier*, 529 U.S. at 879).

However, the cited page of *Geier* merely found that the 1984 regulations were intended to produce a mix of "airbags and other *nonseatbelt* passive restraint systems." *Geier*, 529 U.S. at 879 (emphasis added). *Geier* never suggested that the agency intended to achieve a mix of different *manual seatbelt* types in rear seating positions.

Second, NHTSA in 1989 emphasized its desire to implement the new seatbelt rule swiftly and did not identify any policy reason for gradually phasing it in over time. Indeed, the agency issued the rule for passenger cars before it had worked out the final details of the rule's application to other vehicles to ensure "the earliest possible implementation" of the requirement for Type 2 seatbelts in rear outboard seats. 54 Fed. Reg. at 25,276; *see also id.* at 25,277; 54 Fed. Reg. at 46,258. The agency also treated the second step of the rulemaking as a "high priority action, to ensure that the incremental benefits are available in a timely fashion." 54 Fed. Reg. at 25,276. In contrast to NHTSA's statements in issuing the 1984 passive restraint regulations, *see Geier*, 529 U.S. at 878-79, NHTSA in 1989 did not express any fear of a public backlash against immediate imposition of the requirement for Type 2 seatbelts in rear outboard seats. In fact, the agency based its decision to require Type 2 seatbelts for these seats in large part on the increased use and public acceptance of Type 2 seatbelts. 53 Fed. Reg. at 47,983. And for rear aisle seats, the agency issued no new rule or requirement, but encouraged manufacturers to install Type 2 seatbelts. 54 Fed. Reg. at 46,258.

Third, unlike the 1984 passive restraint standard, the 1989 manual seatbelt regulations were not conditional and were not designed to be rescinded if states adopted mandatory seatbelt buckle-up laws. As noted by NHTSA, most states had already adopted buckle-up laws by 1989.

54 Fed. Reg. at 25,276. NHTSA anticipated that the new rule requiring Type 2 seatbelts would itself "encourage increased rear seat belt use, by providing rear seat occupants with maximum safety protection when they buckle up." 53 Fed. Reg. at 47,982; *accord* 54 Fed. Reg. at 46,257. The agency reasoned: "If people who are familiar with and in the habit of wearing lap/shoulder belts in the front seat find lap/shoulder belts in the rear seat, it stands to reason that they would be more likely to wear those belts when riding in the rear seat. Thus, the presence of lap/shoulder belts in the rear seat should result in an increase in rear seat belt use." 53 Fed. Reg. at 47,983-84. This prediction has since proven to be correct. *See* 69 Fed. Reg. at 70,905 (citing 1999 NHTSA study finding "that belt use was approximately seven to ten percent higher at rear outboard designated seating positions with a lap/shoulder belt than at ones with only a lap belt").

Finally, NHTSA expressly concluded that the 1989 seatbelt rule did "not have sufficient federalism implications to warrant the preparation of a Federalism Assessment" pursuant to President Reagan's Executive Order 12612. 54 Fed. Reg. at 46,265-66; 54 Fed. Reg. at 25,278. This Executive Order required NHTSA to discuss the extent of the regulation's interference with state sovereignty. 52 Fed. Reg. at 41,687-88. And NHTSA concluded that the regulation did not have any impact on state sovereignty that was worthy of discussion.[11]

NHTSA was faithfully applying Executive Order 12612 during the time period when it adopted the 1989 seatbelt regulations. As NHTSA stated in 1988: "The purpose of the Order is to limit Federal preemption of State laws,

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[11] Executive Order 12612 had not yet been issued at the time of the 1984 passive restraint regulations at issue in *Geier*.

unless preemption is necessary to address a national safety need." 53 Fed. Reg. 23,673 (June 23, 1988). In 1991, the agency confirmed that "NHTSA has taken care to minimize, to the extent consistent with safety, the preemptive effect of its regulations in accordance with the regulatory philosophy behind the Executive Order." 56 Fed. Reg. 38,100, 38,101 (Aug. 12, 1991). Thus, NHTSA's decision not to prepare a Federalism Assessment for the 1989 seatbelt rule, and its contemporaneous application of Executive Order 12612, further demonstrate that the agency itself saw no conflict between the 1989 rule and state common-law duties. *See Wyeth*, 129 S. Ct. at 1201 (relying on FDA's federalism statement that rule would "not contain policies that have federalism implications or that preempt State law"); *United States v. Massachusetts*, 493 F.3d 1, 18-19 (1st Cir. 2007) (relying on Coast Guard's federalism statements in addressing claim of implied conflict preemption).

For these reasons, the policy objectives on which *Geier* turned do not support a finding of preemption here. The agency's 1984 policies on passive restraints have no relevance to the pertinent provisions of the 1989 version of Standard 208 governing Type 2 seatbelts in rear seats.

C. Petitioners' Common-Law Claims Do Not Conflict With the Agency's 1989 Decision Not to Mandate Type 2 Seatbelts for the Aisle Seating Positions of Passenger Vans.

When NHTSA enacted the 1989 rule governing Type 2 seatbelts in rear outboard seating positions, the agency explained exactly why it had decided not to mandate Type 2 seatbelts for center and aisle seating positions. For the aisle seating positions of passenger vans, NHTSA explained that its decision was based on a concern that

anchoring the shoulder belt to the side of the vehicle would obstruct access to the more rearward (*e.g.*, third row) seats. 54 Fed. Reg. at 46,258. At the same time, NHTSA explicitly *encouraged* manufacturers to find ways to design and install Type 2 seatbelts in aisle seating positions without obstructing the aisle. *Id.*

NHTSA's reason for exempting aisle seating positions from the Type 2 seatbelt requirement does not preempt petitioners' common-law claims. First, it is difficult to imagine how petitioners' claim that Mazda *should have* installed a Type 2 seatbelt in the aisle seating position of a minivan manufactured in 1993 could present an obstacle to the agency's 1989 policy of *encouraging* manufacturers to install Type 2 seatbelts in aisle seating positions. Far from hindering the agency's goals, petitioners' tort claim advances NHTSA's policy of promoting Type 2 seatbelts for aisle seats. This is exactly the type of complementary role Congress intended state tort law to play when it defined the motor vehicle safety standards as only "minimum" standards and deliberately preserved common-law liability. *See* S. Rep. No. 89-1301, *reprinted in* 1966 U.S.C.C.A.N. at 2714 ("Manufacturers and parts suppliers will thus be free to compete in developing and selecting devices and structures that can meet or surpass the performance standard"); *Ketchum v. Hyundai Motor Co.*, 57 Cal. Rptr. 2d 595, 599 (Cal. Ct. App. 1996) ("Both [the Safety Act's definition of a motor vehicle safety standard] and the Senate Report reflect Congress's desire to specify only the minimum standards for motor vehicle safety, with the expectation that market factors would encourage manufacturers to develop higher safety performance," factors including "the risk of tort liability.").

Second, the agency's assessment of technological feasibility as of 1989 was obviously based on the conditions

and technology existing at that point in time. By 1993, when the Williamsons' vehicle was manufactured, the industry had four years of experience with the new rule mandating Type 2 seatbelts in rear outboard seating positions. By that time, there were technologically feasible ways of installing Type 2 seatbelts in aisle seating positions without anchoring the shoulder belt to the vehicle in a way that blocked the aisle. For example, General Motors began installing Type 2 seatbelts in aisle seating positions as early as 1991. 69 Fed. Reg. at 70,909. Nothing in the 1989 rulemaking suggests that NHTSA intended to freeze safety levels to the restraint technology existing in 1989.

The Safety Act was crafted with the goal of encouraging technological innovation to achieve greater vehicle safety. *See* S. Rep. No. 89-1301, *reprinted in* 1966 U.S.C.C.A.N. at 2709 (stating that Safety Act intended to "channel the creative energies and vast technology of the automobile industry into a vigorous and competitive effort to improve the safety of vehicles"); *id.* at 2712 ("[V]igorous competition in the development and marketing of safety improvements must be maintained."). By defining federal safety standards as only minimum standards, Congress confirmed that they were "not intended or likely to stifle innovation in automotive design." *Id.* at 2714. And by providing that compliance with a safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), Congress gave manufacturers a continuing incentive to develop even safer vehicles. *See* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1615 (2007) (noting "a risk that a design minimum over time will become obsolete and underprotective; indeed, car safety is one area where companies compete and states and juries might reasonably determine that an out-of-date standard

is far from the state of the art"); *see also State Farm*, 463 U.S. at 49 (noting Congress intended that DOT's implementation of the Safety Act would "not depend on current technology and could be 'technology-forcing' in the sense of inducing the development of superior safety design"). If technological constraints at a particular point in time could operate to preempt future common-law liability, vehicle manufacturers would no longer have this incentive to develop safer technologies once a standard was in place.

Third, as the California Court of Appeal itself acknowledged, the Safety Act *requires* NHTSA "to consider factors such as feasibility and cost in issuing motor vehicle safety standards." Pet. App. 21 (citing 49 U.S.C. § 30111(b)(1), (3) & (4)); *see also State Farm*, 463 U.S. at 54-55; *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 57-58 (2d Cir. 2003); *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1343 (D.C. Cir. 1985); S. Rep. No. 89-1301, *reprinted in* 1966 U.S.C.C.A.N. at 2714. If the agency's mandatory consideration of these factors were sufficient to exert preemptive effect, *any* decision by NHTSA to adopt a motor vehicle safety standard and reject a stricter standard would preempt state common law. This result would subvert the intent of the savings clause and obliterate the valuable role that Congress intended state tort law to play in providing compensation to accident victims and creating an incentive for manufacturers to provide a reasonable level of safety, even above the federal minimum.

Finally, in the context of another statutory scheme similar to the Safety Act, this Court has ruled that an agency's concerns about the costs and technological feasibility of a particular safety device do not constitute the type of "authoritative" message of federal policy sufficient

to preempt state common law. *Sprietsma*, 537 U.S. at 67. In *Sprietsma*, the applicable statute was the Federal Boat Safety Act of 1971, which authorizes the Coast Guard to establish minimum boat safety standards, but also includes a savings clause to preserve the operation of state common law. *Id.* at 57-59. The question in *Sprietsma* was whether the Coast Guard's decision not to mandate propeller guards impliedly preempted a state tort claim for failure to install a propeller guard. *Id.* at 64-68.

In a unanimous decision distinguishing *Geier*, this Court found that the Coast Guard's "intentional and carefully considered" decision not to mandate boat propeller guards did not preempt the plaintiff's tort claim *Id.* at 67. The Court found that the Coast Guard's decision was based primarily on "available data" regarding the costs, technical feasibility, and relative safety benefits of mandating a universally acceptable propeller guard for all modes of boat operation. *Id.* at 61-62, 66-67. However, the Coast Guard did not make any "policy" judgment that states "should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as unsafe." *Id.* at 67. Because the Coast Guard's reasoning did "not convey an 'authoritative' message of a federal policy against propeller guards," this Court found that the plaintiff's tort claim was not preempted. *Id.* at 67-68; *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (finding tort claim for failure to install antilock braking system (ABS) on tractor-trailers was not impliedly preempted where "NHTSA has not ordered truck manufacturers to refrain from using ABS devices").

Just as the Coast Guard "did not reject propeller guards as unsafe," *Sprietsma*, 537 U.S. at 67, NHTSA has never rejected Type 2 seatbelts as unsafe for aisle seating positions. In fact, NHTSA recognized that Type 2

seatbelts are safer and more effective in all rear seats. 54 Fed. Reg. at 46,257-58; 54 Fed. Reg. at 25,275-76. Under *Sprietsma*, NHTSA's 1989 concern about the technological feasibility of installing Type 2 seatbelts in aisle seating positions did "not convey an 'authoritative' message of a federal policy" sufficient to preempt petitioners' tort claim. *Sprietsma*, 537 U.S. at 67. The agency's concern about technological feasibility as of 1989 "does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective, emphasized by its title, of promoting [vehicle] safety." *Id.* at 70.

In sum, petitioners' common-law claims do not conflict with the 1989 version of Standard 208. In light of NHTSA's own findings that Type 2 seatbelts offer greater occupant protection and that their availability increases rear seatbelt usage, and the agency's explicit encouragement of Type 2 seatbelts in aisle seats, petitioners' theory that a reasonable manufacturer in 1993 should have installed a Type 2 seatbelt in a rear aisle seat is consistent both with the statutory purpose "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 49 U.S.C. § 30101, and with NHTSA's policy objectives as expressed in the 1987-1989 regulatory history and final rule.

III. THE OTHER FACTORS CITED BY THE CALIFORNIA COURT OF APPEAL DO NOT SUPPORT A FINDING OF IMPLIED PREEMPTION.

The California Court of Appeal also relied on a hodgepodge of additional factors to support its finding of implied obstacle preemption. Pet. App. 16-18. Some of these factors had nothing to do with the agency's 1989 decision not to mandate Type 2 seatbelts for center and aisle

seating positions, and none supports a finding of implied obstacle preemption.

A. Compatibility with Child Restraints

Mazda has argued that NHTSA's 1989 decision not to mandate Type 2 seatbelts for rear center and aisle seating positions was related to the compatibility of Type 2 seatbelts and child restraints. *See, e.g.*, JA 175-76, 344-45. The California Court of Appeal and several other lower courts have found that "'safety and consumer acceptance (with respect to child restraints)'" were factors for the 1989 rule that support a finding of implied preemption. Pet. App. at 18 (quoting *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722, 727 (Ind. Ct. App. 2008)); *see also Carden*, 509 F.3d at 231 n.2.

The 1987-1989 regulatory history emphatically refutes this theory. During the rulemaking, NHTSA considered and expressly dismissed two distinct concerns relating to child restraints. First, the agency mentioned that it had denied the earlier citizen petition for Type 2 rear seatbelts because, in 1984, it believed that child restraints equipped with a tether anchorage would offer greater protection than booster seats with Type 2 seatbelts. 53 Fed. Reg. at 47,982. Even in 1984, however, the agency acknowledged a growing trend away from tether anchorages. 49 Fed. Reg. at 15,241. By 1988, the agency explained that it had decided to revisit the issue because "child restraint production had shifted away from those that were designed to have a tether anchored to the vehicle." 53 Fed. Reg. at 47,983. Thus, the issue regarding tether anchorages was moot by the time of the 1989 rule.

Second, in promulgating the 1989 standard, NHTSA discussed commenters' concerns about the compatibility of child seats with Type 2 seatbelts equipped with ELRs. *See*

supra pp. 7-8, 10. Although the agency found that these concerns were unsubstantiated, it nevertheless decided to remove any *public perception* of a safety issue by mandating an additional lockability requirement. 53 Fed. Reg. at 47,988; 54 Fed. Reg. at 46,261-62. The agency expressed confidence that this lockability requirement would "remove these perceived questions" and "ensure that child safety seats can be tightly secured." *Id.* at 46,262.

Significantly, neither the commenters nor NHTSA suggested that these concerns regarding child restraints were specific to center or aisle seating positions. To the contrary, NHTSA's reasons for rejection of these concerns applied equally to all seating positions, including the rear outboard seats for which the agency mandated Type 2 seatbelts. NHTSA mentioned nothing at all about compatibility with child seats when it explained why it was not mandating Type 2 seatbelts for center and aisle seating positions. 53 Fed. Reg. at 47,984-85; 54 Fed. Reg. at 46,258-59.

Thus, concern about compatibility with child seats had nothing to do with the agency's 1989 decision regarding center and aisle seating positions. Rather, NHTSA expressly concluded that Type 2 seatbelts would provide greater protection for children in booster seats because of the additional upper torso restraint. 53 Fed. Reg. at 47,984. The safety benefit of this additional upper torso restraint was not somehow limited to outboard seating positions. As previously noted, the agency found that Type 2 seatbelts in rear seats "would offer benefits for children riding in some types of booster seats, would have no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts, and would offer older children the same incremental safety protection that would be afforded adult

rear seat occupants." *Id.* at 47,988-89. NHTSA never suggested that these safety benefits for children were inapplicable to aisle and center seating positions.

In light of this regulatory history, the conclusion that NHTSA gave manufacturers the option of installing Type 1 or Type 2 seatbelts in center and aisle seating positions because of some child safety issue is plainly wrong. Indeed, if the use of Type 2 seatbelts in center and aisle seating positions did pose a child safety issue, surely NHTSA would not have given manufacturers the option of installing Type 2 seatbelts in those seating positions and would not have encouraged manufacturers to find ways to install Type 2 seatbelts in aisle seating positions. Accordingly, petitioners' state-law tort claim would not interfere with any federal policy regarding child safety.

B. Comprehensiveness of Standard 208

The California Court of Appeal also relied on the following language from the Eleventh Circuit's opinion in *Griffith*: "'In *Geier*, the Court found that the rulemaking history of FMVSS 208 makes clear that DOT saw it not merely as a minimum standard, but as a comprehensive regulatory scheme.'" Pet. App. 18 (quoting *Griffith*, 303 F.3d at 1281). This description is not an accurate portrayal of either *Geier* or the agency's position.

Geier did *not* hold that the plaintiff's airbag claim was preempted because DOT viewed Standard 208 as a "comprehensive" regulatory scheme, rather than a minimum standard. The word "comprehensive" does not appear in the majority opinion. In fact, the Court explicitly rejected the notion that the mere volume and complexity of agency regulation can impliedly preempt state law in the absence of a specific statement of preemptive intent. *Geier*, 529 U.S. at 884 (citing *Hillsborough Cty.*, 471 U.S.

at 717). As the Court explained in *Hillsborough*: "We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes." *Hillsborough Cty.*, 471 U.S. at 717. "To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Id.* Thus, whether or not the court below properly characterized Standard 208 as "comprehensive," that characterization is not sufficient to trigger preemption.

C. Use of Rear Seatbelts

The California Court of Appeal also relied on *Griffith*'s finding that the agency purportedly intended Standard 208 "'to produce a mix of restraint devices, both passive and manual'" to "'maximize the likelihood that people would actually use the passenger restraint systems installed in their cars and trucks.'" Pet. App. 18 (quoting *Griffith*, 303 F.3d at 1280-81).

As previously explained, there is no evidence that the agency intended to achieve a mix of different manual seatbelt types. Nor did the agency ever suggest that having a variety of seatbelt types would increase seatbelt use in rear seating positions. When NHTSA enacted the 1989 rule, it specifically concluded that requiring Type 2 seatbelts in rear seating positions would increase seatbelt use. In its NPRM, the agency stated: "NHTSA's decision to proceed with a proposal to require rear seat lap/shoulder belts is based on the agency's tentative conclusion that *these types of belts will increase belt use* in the rear seats." 53 Fed. Reg. at 47,987 (emphasis added).

When it adopted the final rule, the agency reiterated that Type 2 seatbelts would "*increase safety belt use* in rear seating positions of these vehicle types." 54 Fed. Reg. at 46,257 (emphasis added). In sum, NHTSA believed that installing Type 2 seatbelts would increase rear seatbelt use; it did not suggest that ensuring a mix of Type 1 and Type 2 seatbelts in rear seating positions would do so.

D. Technological Innovation

Finally, the California Court of Appeal concluded that the agency's decision was based on a policy of "'lowering costs to encourage technological developments.'" Pet. App. 18 (quoting *Roland*, 881 N.E.2d at 727). However, the only relevant technological innovation the agency encouraged through the 1989 standard was new ways to design and install Type 2 seatbelts in aisle seating positions without obstructing the aisle. 54 Fed. Reg. at 46,258. Petitioners' tort claim promotes rather than obstructs this goal. When NHTSA encourages manufacturers to overcome a technological hurdle to achieve greater vehicle safety, state tort law plays a complementary role by giving manufacturers a financial incentive to do what the agency has encouraged. Without the threat of tort liability, manufacturers would have little incentive to do anything more than comply with the federal minimum standards. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 450 (2005) (rejecting preemption argument and stating that tort litigation "history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items"); Buzbee, 82 N.Y.U. L. Rev. at 1588 ("Without the fear of tort liability, and absent new regulation, risk creators would have little incentive to improve their operations and reduce risk, absent a profit motive that coincided with improvement.").

In sum, none of the factors cited by the California Court of Appeal supports its finding of implied conflict preemption. And given the absence of a clear conflict between the 1989 seatbelt rule and the Williamsons' claims, this Court has "a duty to accept the reading that disfavors pre-emption." *Bates*, 544 U.S. at 449. For the Court to find an implied conflict with federal policies that the agency either has disavowed (such as the asserted policy in favor of diversity of manual seatbelt types) or has said are not obstructed by the state-law claim (such as child safety) would be unprecedented.

CONCLUSION

The decision of the California Court of Appeal should be reversed and the case remanded for further proceedings.

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In the Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,

Petitioners,

V.

MAZDA MOTOR OF AMERICA, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

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QUESTION PRESENTED

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 (Safety Act), directs the Secretary of Transportation to "establish by order motor vehicle safety standards." Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. § 571.208 (1987), regulates occupant crash protection, including seatbelt requirements. From 1967 through the time period at issue in this case, FMVSS 208 gave automobile manufacturers the option of installing a lap-only or lap/shoulder belt in the rear inboard seating positions of vehicles. In 1984, the National Highway Traffic Safety Administration (NHTSA) specifically rejected a proposal that FMVSS 208 be amended to require lap/shoulder belts in all rear seats, and in 1989 the agency reaffirmed that decision as to rear center/aisle seats. NHTSA's decision to give manufacturers the freedom to choose either a lap-only or lap/shoulder seatbelt in rear center/aisle seats was the product of a deliberate policy judgment intended to further the objectives of the Act, including safety, technical feasibility, cost, and public acceptance.

The question presented is whether the Safety Act or FMVSS 208 preempts state tort claims that an automobile manufactured in 1993 was defectively designed because it contained a lap belt—rather than a lap/shoulder belt—in a rear center/aisle seat.

RULE 29.6 STATEMENT

Mazda Motor of America, Inc. dba Mazda North American Operations is wholly owned by Mazda Motor Corporation. Ford Motor Company is the only publicly held company that owns 10% or more of the issued stock of Mazda Motor Corporation.

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INTRODUCTION

This Court held in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), that the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 (Safety Act) and Federal Motor Vehicle Safety Standard (FMVSS) 208 preempt state lawsuits seeking to impose tort liability on automobile manufacturers for not installing airbags. In so holding, the Court emphasized that the National Highway Traffic Safety Administration (NHTSA) had made a deliberate policy judgment based on the objectives of the Safety Act that manufacturers should be free to choose among "different passive restraint devices" in complying with FMVSS 208. 529 U.S. at 875. A "state tort law" rule requiring manufacturers to install airbags would have contravened that deliberate policy judgment and thus, the Court held, would "stand as an 'obstacle' to the accomplishment of [the federal] objective." *Id.* at 886.

From 1967 through the time period at issue in this case, FMVSS 208 also gave automobile manufacturers the option to install either lap-only (Type 1) or lap/shoulder (Type 2) seatbelts in rear center and aisle seats of vehicles. In 1984, NHTSA rejected a proposal that it require Type 2 belts in all rear seats, primarily because it concluded that mandating Type 2 belts would make children *less* safe. And in 1989, the agency refused to mandate Type 2 belts in rear center/aisle seats based on safety and other concerns, including the fact that installing Type 2 belts in those seats could make it more difficult for rear passengers to enter or exit the vehicle, impede drivers' rearward vision, and divert agency and industry resources from higher value safety initiatives. As NHTSA's own chief counsel confirmed in 1994--a year after the vehicle in

this case was manufactured—the agency determined that manufacturers were in "the best position" to determine when installation of Type 2 belts in those seats was appropriate for their vehicles. *Infra* at 28.

Every appellate court that has considered the issue has concluded that the seatbelt option established by FMVSS 208 reflects the same kind of deliberate policy judgment as the airbag rule held preemptive in *Geier*. Indeed, as Judge Wood observed in a similar vein in *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377, 381 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001), "it is hard to see any significant difference between the two situations." Faced with that reality, petitioners ground their case on a legal theory straight out of the *dissent* in *Geier*—arguing for a strong "presumption against preemption" even though this Court has already held that the Safety Act imposes no "special burden" on conflict preemption claims, *Geier*, 529 U.S. at 872, and instead adopts "ordinary pre-emption principles," *id.* at 874. Petitioners' *amici* are more candid and simply say that *Geier* should be "reconsider[ed]." Attorneys Information Exchange Group Br.22; *accord* State of Illinois Br.25; Public Justice Br.1-2. But *Geier* is firmly grounded in this Court's precedents and compels the conclusion that petitioners' state tort claims are preempted.

To avoid that conclusion, petitioners repeatedly mischaracterize respondents' position as arguing that "mere compliance with an option ... is sufficient to preempt state common law." Pet.Br.26-27. As the United States recognizes, however, respondents' position—like the decision below—in fact rests on the premise that FMVSS 208 not only offers manufacturers an option but embodies a policy

judgment that manufacturers should be free to choose between Type 1 and Type 2 belts in rear center/aisle seats. U.S.Br.13-14. Just as the Court held was true for the analogous option in *Geier*, a state tort rule requiring manufacturers to install Type 2 belts in those seats would contravene that deliberate policy judgment and frustrate the federal objectives it serves.

Unlike petitioners, the United States largely accepts the *Geier* framework and contends that "ordinary principles of conflict preemption" displace state law that would interfere with a federal regulation that seeks to ensure that parties "remain free to choose among [specified] options." U.S.Br.11, 8. We agree with that formulation of the key legal inquiry. Like petitioners, however, the government ultimately fails to account for critical aspects of the administrative record. Moreover, the government's position is inherently suspect. The government stood idle for almost a decade while one appellate court after another held that FMVSS 208 *preempts* seatbelt-related claims like petitioners'. The common-sense conclusion is that the government believed that those decisions were correct then—and only recently changed its view due to "shifting political tides." Public Justice Br.19-20. That newfound position does not merit any deference, and it is just as unpersuasive as petitioners' position.

STATEMENT OF THE CASE

A. Statutory And Regulatory Scheme

Congress passed the Safety Act in 1966 "[t]o provide for a coordinated national safety program and establishment of safety standards for motor vehicles." Pub. L. No. 89-563, 80 Stat. 718, 718 (1966). The Act reflected Congress's judgment that "primary responsibility for regulating the national automotive

manufacturing industry must fall squarely upon the Federal Government," in part because "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry" made it essential that safety standards "be uniform throughout the country." S. Rep. No. 89-1301, at 4, 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712, 2720.

In a section of the Act entitled "Preemption," Congress provided that whenever a FMVSS is in effect, "a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the [federal] standard." 49 U.S.C. § 30103(b)(1). The Act separately states that "[c]ompliance with a motor vehicle safety standard ... does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). In *Geier*, this Court held that this "saving clause" "does *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869. State tort claims that would "frustrate the accomplishment of a federal objective" under the Safety Act are thus preempted. *Id.* at 873.

The Safety Act directs the Secretary of Transportation to establish federal motor vehicle safety standards which "shall be practicable, [and] meet the need for motor vehicle safety." 49 U.S.C. § 30111(a). The "practicability" requirement compels the Secretary to consider factors "including technological ability to achieve the goal of a particular standard as well as ... economic factors." H.R. Rep. No. 89-1776, at 16 (1966). The Secretary has delegated the responsibility to promulgate FMVSSs to the Administrator of NHTSA. 49 C.F.R. § 1.50(a).

Most FMVSSs establish "performance standards," S. Rep. No. 89-1301, at 5, *reprinted in* 1966 U.S.C.C.A.N. at 2713-14; JA.211, and typically merely establish a federal floor. *See, e.g.*, 23 C.F.R. § 255.21 S4.1.2 (1968) (establishing minimum percent of windshield area that must be wiped by vehicle's windshield wiping system). But some FMVSSs establish *design* standards that mandate the installation of particular safety features, establishing both a floor and a ceiling. *See, e.g., id.* § 255.21 S3 (1968) ("A windshield defrosting and defogging system shall be provided."). And occasionally, NHTSA finds that the Act's purposes are served best by leaving manufacturers free to choose among specified design options. The rule at issue in this case –like the rule in *Geier*—fits in this last category.[1]

B. NHTSA's Deliberate Decision To Give Manufacturers The Freedom To Choose A Type 1 Or Type 2 Belt For Rear Center And Aisle Seats

For most Americans today buckling up with a lap/shoulder belt is as familiar as the automatic window. But in fact, like the automatic window, the presence of a lap/shoulder belt in every seating position is only a relatively recent development. The story of NHTSA's rulemaking governing the installation of

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[1] Petitioners suggest (Br.28 n.9) that the design option in this case is not uncommon, but they struggle to identify actual analogs. In fact, almost all the examples they cite are not design options at all, but merely allow manufacturers to demonstrate safety through various testing requirements, which themselves are more akin to classic performance standards. *See, e.g.*, 49 C.F.R. § 571.108 at S6.4.3 (requiring manufacturers to certify compliance of each lamp function by one of two specified means).

Type 2 belts in particular seating positions is critical to the proper resolution of this case.

1. As initially promulgated in 1967, FMVSS 208 required manufacturers to install Type 2 seatbelts in *front* outboard seating positions, but provided manufacturers with the option to install "a Type 1 *or* a Type 2 seat belt assembly" in each other passenger car seat position. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967) (emphasis added). Although the agency did not publish any explanation with that rule, the difference in treatment based on seat location surely reflected both safety and cost considerations. For example, NHTSA well understood that rear seats frequently were used by children, and that the child seats of that era were generally more compatible with Type 1 belts. 35 Fed. Reg. 14,941, 14,942 (Sept. 25, 1970); *see also* 49 Fed. Reg. 15,241, 15,241 (Apr. 18, 1984) (explaining that "most child restraints are designed to be used only with lap belts" and that use of "Type 2 belts in the rear outboard seating positions would make the installation of the conventional child safety seat much less convenient than with the current belt").

NHTSA also appreciated that mandating Type 2 belts could depress overall seatbelt usage. *E.g.*, 35 Fed. Reg. at 14,942. Throughout the 1970s, NHTSA struggled with low public acceptance of seatbelts, and by 1981 seatbelt use plummeted to only *11%*. 46 Fed. Reg. 2064, 2064 (Jan. 8, 1981). Shoulder belts were a chief source of complaints, "contribut[ing] substantially to the public's complaints of lack of comfort and fit." 41 Fed. Reg. 54,961, 54,962 (Dec. 16, 1976); *see also* 46 Fed. Reg. at 2064. Type 2 belts also suppressed seatbelt usage by women, due to "greater problems of

chest fit and pressure" caused by shoulder straps. 44 Fed. Reg. 77,210, 77,212 (Dec. 31, 1979).

2. In the 1980s, NHTSA considered—and rejected in pertinent part—two petitions that specifically asked the agency to mandate Type 2 belts in rear seats.

a. In 1982, individuals associated with a highway safety group filed a petition urging NHTSA to "require the installation of Type 2 safety belts ... in the rear outboard seating positions of passenger cars," claiming that doing so would enhance child safety and offer "added protection" for adults as well. 49 Fed. Reg. at 15,241. The agency rejected that petition in 1984, largely for child safety reasons. *See id.* at 15,241-42. NHTSA explained that child restraint systems and booster seats were safer for children when attached with tethers rather than Type 2 belts. *Id.* at 15,241. NHTSA also found that "young children['s] chest cavities are very flexible and vulnerable to chest belt loads," and that "[a] Type 2 belt system would create these chest belt loads." *Id.* at 15,242. While Type 2 belts "might give some added degree of protection to adults," NHTSA found that any such benefits did not outweigh the costs to child safety. *Id.*

b. In 1987, the agency received a petition from a child safety association asking NHTSA to require the installation of lap/shoulder belts in all rear seating positions, prompting the agency to "reexamine" this issue from 1987-1991. After receiving nearly three dozen comments on its advance rulemaking notice, and over 70 more comments on its notice of proposed rulemaking, 54 Fed. Reg. 46,257, 46,258 (Nov. 2, 1989), NHTSA decided to mandate Type 2 belts in rear *outboard* positions. But it chose to maintain the status

quo option for rear center/aisle seats, for safety and technical reasons discussed below. *Id.* at 46,258.

The decision to mandate Type 2 belts for rear *outboard* seats largely reflected a changed cost-benefit calculus from 1984. "Safety belt use in rear seats had increased eightfold [from 2 to 16%]" from 1981 to 1987, increasing the numbers of adults who might benefit from rear shoulder belts. 54 Fed. Reg. 25,275, 25,276 (June 14, 1989). Moreover, the costs of requiring Type 2 belts in rear *outboard* seats had nearly vanished. While NHTSA had worried that the rule's estimated cost of $140 million annually, *id.*, was "extremely disproportionate to the possible safety benefits," 52 Fed. Reg. 22,818, 22,819 (June 16, 1987), it discovered that "nearly every 1990 model year passenger car would have been voluntarily equipped with rear outboard seat lap/shoulder belts" anyway, reducing the cost to about $790,000, 54 Fed. Reg. at 25,276.[2]

3. NHTSA's decision to preserve FMVSS 208's express option allowing manufacturers to install Type 1 or Type 2 belts in rear center and aisle seats was grounded on the objectives of the Safety Act.

Child Safety

By requiring Type 2 belts in rear outboard seats, but allowing Type 1 belts in rear center and aisle seats, the agency accommodated competing child safety considerations. By 1989, NHTSA concluded that "child restraint production had shifted away from those that were designed to have a tether" (akin to what later

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[2] Although petitioners point to a report issued by the National Transportation Safety Board ("NTSB") questioning the safety of lap only belts, Pet.Br.5-6, NHTSA itself thoroughly repudiated this report and found that "lap belts are effective in preventing death and reducing injuries." 52 Fed. Reg. at 22,820.

would become known as the "LATCH" system) to designs that could be anchored by a Type 2 belt, and also that booster seats for older children would be safer if used with shoulder belts. 53 Fed. Reg. 47,982, 47,983-84 (Nov. 29, 1988).[3] But tethered child seats remained common. And actual public acceptance of booster seats was low. *See id.* at 47,988. Even years later, a 1994 NHTSA survey indicated that only *0.8%* of children aged 6-12 sat in a child or booster seat, as compared to 55.9% who sat in seatbelts.[4]

Moreover, as NHTSA explained, "[m]any of these children are not yet big enough to use the shoulder belt in the rear seat ... since it could pass over their neck or face." 53 Fed. Reg. at 47,988. For the vast majority of older children who did *not* use booster seats, NHTSA instructed parents to disable the shoulder portion of a Type 2 belt, essentially converting it into a make-shift *Type 1* belt (a practice NHTSA later determined was unsafe, *see infra* at n.11). *See id.* at 47,988-89.

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[3] The agency long retained its view, however, that tethers better promoted child safety than Type 2 belts. NHTSA's view was vindicated over time. Citing widespread problems of child safety seat misuse and the need for greater safety, NHTSA mandated the installation of designated anchorages to support tethers in 1999. *See generally* 64 Fed. Reg. 10,786 (Mar. 5, 1999)

[4] Kathleen D. Klinich et al., NHTSA, DOT HS-808 248, *Study of Older Child Restraint/Booster Seat Fit and NASS Injury Analysis* at 6 (Nov. 1994) ("NASS Study"). This was especially troubling since NHTSA found that children should not wear Type 2 belts until they reached 148cm (4'10") and 37 kg (81 pounds), the median size of an 11-year-old. *Id.* at Abstract; Robert J. Kuczmarski et al., National Center for Health Statistics, *2000 CDC Growth Charts* at 27-30 (May 2002), *available at* http://www.cdc.gov/nchs/data/series/sr_11/sr11_246.pdf.

As petitioners note, NHTSA expected the rule to have "no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts." Pet.Br.8. But this was only because NHTSA continued to recommend that those children be placed in the *rear center* seat or in rear outboard seats with disabled shoulder belts. *See, e.g.*, 56 Fed. Reg. 3064, 3064 (Jan. 28, 1991) ("[E]ven as more rear outboard seating positions of vehicles on the road have shoulder restraints, the safest position for the child restraint (the center rear position) will not be equipped with shoulder restraints."). Due in part to concerns about "misuse" of the "shoulder portion of the lap/shoulder combination," NHTSA did not even permit the *testing* of child seats using shoulder belts until 1994. 58 Fed. Reg. 46,928, 46,929 (Sept. 3, 1993); 59 Fed. Reg. 37,167, 37,167 (July 21, 1994).[5]

Aisle Seat Safety

NHTSA also found "merit" in distinct design and safety concerns with the use of Type 2 belts in rear center/*aisle* seats—the seat involved in this case. 54 Fed. Reg. at 46,258. As NHTSA explained, "[t]his exclusion of aisleway seats from the rear seat lap/belt requirement reflected NHTSA's determination that the shoulder belt stretched across the aisleway of a vehicle could cause entry and exit problems for occupants of seating positions to the rear of the aisleway seating position." 55 Fed. Reg. 30,914, 30,915

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[5] During the rulemaking, NHTSA considered distinct concerns regarding the compatibility of child restraint systems with emergency locking retractor belts (ELRs). As the government notes, however, these concerns were equally applicable to Type 1 and Type 2 belts, and did not impact the agency's decision-making regarding rear center/aisle seats. U.S.Br.26.

(July 30, 1990). In addition, "[t]his exclusion was added ... because attaching belt anchorages to the side of the vehicle could cause a lap/shoulder belt to fit its user poorly." 69 Fed. Reg. 70,904, 70,905 (Dec. 8, 2004).

NHTSA encouraged manufacturers to install Type 2 belts in these seats if they could overcome the technical challenges and safety risks for their own vehicles. 54 Fed. Reg. at 46,258. By intentionally leaving manufacturers free to install Type 1 belts, however, NHTSA recognized that the challenges were not easy to overcome, and that a premature mandate could create safety problems. This caution was validated; over a decade later, some manufacturers still struggled to develop an integrated Type 2 belt system for this seat. *See* 69 Fed. Reg. at 70,909. This finally led the agency to acknowledge that "integrated belt designs are not an optimal design for all types of seats," and to allow manufacturers to install detachable, non-integrated shoulder belts in aisle seats to work around any remaining technical problems. *Id.* at 70,908.

Technical Challenges, Costs, Public Acceptance, And Additional Safety Implications

The agency also found that requiring manufacturers to install Type 2 belts in rear center and aisle seats would prove not only technically difficult but excessively costly, and therefore would be harmful to its broader safety objectives. While the agency found a Type 2-only rule for rear *outboard* seats to be substantially less costly than expected, this was not the case for rear center and aisle seats. Type 2 belts were 67% more expensive to install in rear center versus outboard seats. 52 Fed. Reg. at 22,820. The agency estimated that a Type 2-only rule for rear center seats would cost over $150 million (or over *100 times* the final

cost of the outboard rule)—but produce marginal safety benefits in passenger cars and produce "no reduction in fatalities" in multi-passenger vehicles (MPVs) like the minivan in this case. *Id.* at 22,819-20.

NHTSA also anticipated distinct technical challenges associated with the installation of Type 2 belts in this seating position that created safety as well as public acceptance concerns. In particular, the agency concluded that installation of Type 2 belts in rear center belts might cause "disruptions of the vehicle's cargo carrying area or impede the driver's rearward vision." 53 Fed. Reg. at 47,984. And the agency ultimately determined that "[w]hether or not those difficulties could be overcome, there would be small safety benefits and substantially greater costs" if Type 2 belts were required. *Id.*

As NHTSA explained at the outset of its rulemaking, such a result would interfere with its long-term safety objectives. "Requiring significant industry and agency resources to be spent for relatively little safety gain *can result in a lost opportunity to better improve vehicle safety through other means*, such as improved frontal or side impact protection." 52 Fed. Reg. at 22,819 (emphasis added). Moreover, NHTSA had learned from a series of failed safety rulemakings during the previous two decades that expensive regulations yielding minimal benefits caused "significant long run harm to the safety program," by "poisoning ... popular sentiment towards efforts to improve occupant restraint systems in the future." 46 Fed. Reg. 53,419, 53,424 (Oct. 29, 1981).

4. In 2002, Congress enacted Public Law No. 107-318, 116 Stat. 702 (2002) (Anton's Law), to promote the use of belt-positioning booster seats—an advanced

child safety device that for the first time utilized the shoulder component of Type 2 belts, and which NHTSA first facilitated the introduction of in 1994. 59 Fed. Reg. at 37,168. Because Congress intended that "[c]hildren who have outgrown their child safety seats should ride in a belt-positioning booster seat until an adult seat belt fits properly," 49 U.S.C. § 30127 note § 2(3), it directed NHTSA to initiate a rulemaking to require lap/shoulder belts in each rear seat, with limited exceptions, *id.* at § 5(a)(1). NHTSA responded in 2004 with a rule requiring integrated Type 2 belts in nearly all rear seats. 69 Fed. Reg. at 70,904.

The passage of Anton's Law does not suggest that the child safety concerns impacting NHTSA's 1989 rulemaking were unfounded. As late as 1996, for instance, NHTSA found that "[child] [s]afety seats were used correctly more often with a vehicle that had a ... lap belt rather than a ... lap-shoulder belt." NHTSA, *Observed Patterns of Misuse of Child Safety Seats* at 1 (Sept. 1996), *available at* http://www.nhtsa.gov/people/outreach/traftech/pub/tt133.pdf. Anton's Law was facilitated by two developments *after* 1993. In 1994, NHTSA revised its child safety rules to facilitate the introduction of belt-positioning booster seats—the first booster seats compatible with shoulder belts. In addition, NHTSA circumvented problems of child seat/Type 2 belt misuse and compatibility by adopting a new approach for anchoring child restraints *independent of seatbelts* altogether—a lower anchor, LATCH tether system that it required in new vehicles starting in 1999. *See* 64 Fed. Reg. at 10,788; 49 C.F.R. §§ 571.213, 571.225.

C. This Action

This litigation stems from a fatal accident in Utah involving a 1993 Mazda MPV Minivan ("MPV") driven by Delbert Williamson, in which his wife Thanh and seven-year-old daughter Alexa were passengers. The MPV had seven seats: two front seats, two middle-row seats (a bench with an outboard seat and center/aisle seat), and three back-row seats. Five seats had Type 2 belts. Two seats—the third-row center seat and the middle-row aisle seat—had Type 1 belts. At the time of the crash, Thanh was in the middle-row center/aisle seat (with a Type 1 belt); Alexa was in the middle-row outboard seat (with a Type 2 belt). Pet.App.3a.

Petitioners filed a Second Amendment Complaint in California state court on May 5, 2005. As relevant here, petitioners alleged that Mazda's installation of a Type 1—rather than Type 2—belt in the "middle seat of the middle row" of the MPV amounted to various torts under California law, including negligence and strict products liability. JA.44 ¶ 15; Pet.Br.17. On a motion for judgment on the pleadings, and on subsequent demurrer, the trial court concluded that the claims at issue were preempted by FMVSS 208. JA.194, 355-56.[6] The California Court of Appeal agreed, holding that "FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option" in cases like this. Pet.App.24a.

The Court of Appeal explained, that "'[a] review of the regulatory and rule making history of FMVSS 208 supports the conclusion that the NHTSA's decision to allow car manufacturers the option to install either lap-

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[6] The trial court allowed other claims to go forward, but petitioners chose to forgo those claims. U.S.Br.5-6.

only or lap/shoulder belts in the rear center seating position of passenger vehicles was deliberate, and [that] the agency identified specific policy reasons for its decision.'" Pet.App.16a (quoting *Carden v. General Motors Corp.*, 509 F.3d 227, 231 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2911 (2008)). The court rejected petitioners' argument that the "policy judgments" underlying the option at issue in *Geier* were somehow unique for purposes of the conflict-preemption analysis, and held that *Geier* compelled the conclusion that petitioners' claims were preempted. Pet.App.12a-18a.

The California Supreme Court denied review.

SUMMARY OF ARGUMENT

The Court of Appeal correctly held that petitioners' state law claims are preempted by FMVSS 208.

I. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), this Court held that the Safety Act incorporates "ordinary principles of pre-emption" and that, as a result, state law tort claims that would stand "'as an obstacle to the accomplishment and execution of'" the federal objectives embodied in safety standards under the Act are preempted. *Id.* at 886, 881 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). As the government acknowledges, under ordinary preemption principles, a federal safety standard that deliberately leaves manufacturers "free to choose" (U.S.Br.8) among various options in order to achieve policy objectives under the Safety Act preempts state law tort claims that seek to narrow those options.

II. Petitioners' state law tort claims are preempted because the regulatory record confirms that NHTSA intended to leave manufacturers free to choose a Type 1 or Type 2 belt for the rear center/aisle seating position at issue, in order to serve largely the

same federal objectives as the rule in *Geier*. NHTSA's rule was based on safety concerns tied to the most likely occupants of rear center and aisle seats—children; unique safety and technological concerns presented by the installation of Type 2 belts in rear *aisle* seats; and the fact that installation of Type 2 belts in rear center/aisle seats was extremely costly but offered at most marginal safety benefits for adults. A state law rule mandating Type 2 belts in those seats would stand as an obstacle to the accomplishment of those federal objectives—creating added dangers for many children, forcing manufacturers to install Type 2 belts before they could make the structural changes necessary to avoid safety problems (like obstructing access to the back row) or do so without an enormously disproportionate cost, and risking the public backlash that comes with forcing overly costly measures.

Claims like petitioners' certainly were preempted before 1989, when the agency had consistently *refused* to mandate Type 2 belts in rear seats for, in large part, safety reasons. Petitioners do not argue otherwise. Instead, petitioners argue that claims like theirs were allowed "[b]y 1993," Pet.Br.22, because, "[b]y *that time*, there were technologically feasible ways of installing Type 2 seatbelts in aisle seating positions," Pet.Br.41 (emphasis added). But preemption that flits in and out with asserted safety or technological developments, or with subsequent safety or technical setbacks, is unheard of. Moreover, NHTSA vested *manufacturers*, not juries, with the discretion to decide when the technical barriers to safe installation of Type 2 belts in rear aisle seats had been surmounted for their vehicles. In 1994—a year after the vehicle in this case was made—NHTSA's chief counsel reiterated that

manufacturers are in the "best position" to determine when Type 2 belts are safe and feasible for those seats. That pronouncement alone refutes the argument that allowing juries in 50 states to mandate Type 2 belts *as they saw fit* was consistent with federal objectives.

Petitioners and the government err in arguing that this Court should simply ignore large parts of the administrative record and limit its review *solely* to the 1989 rulemaking. As in *Geier*, the preemption inquiry must be based on the *history* of FMVSS 208, not an isolated moment in regulatory time. Nor is there any basis to ignore the fact that NHTSA recognized that, at least as of 1989, the cost of mandating Type 2 belts in all rear seats would vastly exceed the benefits—squandering economic resources that could produce far greater safety benefits if spent another way. This Court has refused to treat cost-benefit concerns as illegitimate or second-class considerations under statutes far less explicit about the role of cost-benefit analysis than the Safety Act. *E.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009). And there is no basis for excluding cost-benefit considerations from the preemption analysis under the Safety Act.

Here, as in *Geier*, the regulatory record "is clear enough" that the government's view is beside the point. 529 U.S. at 886. But the government's position is inherently suspect in any event. Notwithstanding the high-profile nature of the issue, the government did not voice any objection while one appellate court after another held that claims like petitioners' were preempted over the course of the decade following *Geier*. The natural conclusion is that the government thought those decisions were correct then and only recently had a change of heart due to "shifting political

tides." Public Justice Br.19-20. Such a political about-face is not entitled to any weight. Nor is the government's *post hoc* account of agency action that occurred more than a decade ago persuasive.

III. Petitioners ask this Court to put manufacturers in an impossible position. Manufacturers must be able to take at face value NHTSA's resolution of contentious safety issues involving difficult tradeoffs, including when, as here, NHTSA decides to further federal objectives by granting manufacturers the option to install different equipment types. Indeed, if this lawsuit is not preempted, then presumably neither is a lawsuit based on the premise that a *Type 1* belt should have been installed in a rear center/aisle seat—for example, because a passenger in the back row had difficulty exiting a vehicle following a crash. And petitioners' extraordinary suggestion that the possibility of massive retroactive liability should rest on an indeterminate, *post hoc* judgment about when a particular design option became sufficiently feasible or safe to unleash state tort law actions only makes matters worse. Congress could not possibly have intended to subject the nation's automobile industry to such an arbitrary and penal liability regime.

ARGUMENT

I. IF NHTSA MEANT MANUFACTURERS TO BE FREE TO CHOOSE AMONG DESIGNS TO FURTHER FEDERAL OBJECTIVES, STATE RULES NEGATING THAT CHOICE ARE PREEMPTED

1. The Supremacy Clause of the Constitution (Art. VI, cl. 2) provides that federal law "shall be the supreme Law of the Land." Under settled law

spanning nearly the life of the Republic, state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. *Hines*, 312 U.S. at 67; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (state laws which "interfere with, or are contrary to the laws of Congress," are invalid) (Marshall, C.J.).[7] In *Geier*, this Court affirmed that "ordinary pre-emption principles" apply with full force under the Safety Act. 529 U.S. at 874. Those principles establish the proper framework for analyzing the question presented here.

2. *Geier* concerned the 1984 version of FMVSS 208 as it related to passive restraint devices. The Court considered the Safety Act's express preemption provision in tandem with its saving clause, and held that the saving clause "does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869. The Court explained that "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations," and

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[7] *See also, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981); *Perez v. Campbell*, 402 U.S. 637, 649 52 (1971); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Savage v. Jones*, 225 U.S. 501, 533 (1912). Petitioners' *amici* level a sweeping attack on the well-settled doctrine of conflict preemption. American Ass'n for Justice Br.13; Public Justice Br.5, 27; Constitutional Accountability Center Br.3. The Court rejected a similar effort in *Geier* to drive a "legal wedge" between different conflict-preemption principles. 529 U.S. at 873. Particularly given that petitioners have not asked this Court to reconsider *Geier*, there is no basis to entertain that attack here.

concluded that the Act does not "'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards." *Id.* at 869-70.

This Court also recognized that it would be very nearly absurd for Congress to preserve state law actions that would frustrate the federal regulatory scheme—and refused to interpret the statute that way absent more clear direction from Congress. An "argument [that] would permit common-law actions that 'actually conflict' with federal regulations ... would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect," and would cause the federal law "to defeat its own objectives, or potentially, as the Court has put it before, to 'destroy itself.'" *Id.* at 872 (citation omitted).

The Court then applied ordinary conflict preemption principles and held that a state law all-airbag rule would "actually conflict[] with FMVSS 208." *Id.* at 874. The Court focused on the fact that the agency "deliberately provided the manufacturer with a range of choices among passive restraint devices" in order to "lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance—all of which would promote FMVSS 208's safety objectives." *Id.* at 875. In addition, the Court emphasized that the agency "had *rejected* a proposed FMVSS 208 'all airbag' standard." *Id.* at 879. "Because the rule of law for which petitioners contend would have stood as an obstacle to the accomplishment and execution of [those] important means-related federal objectives," the Court

held that the state tort claim was preempted. *Id.* at 881 (internal quotation marks omitted).

3. While petitioners do not ask this Court to overrule *Geier*, a centerpiece of their argument is based on a proposition that comes straight out of the *dissent* in *Geier*. Petitioners argue that preemption claims under the Safety Act must overcome a "strong presumption against preemption." Pet.Br.21; *see* Pet.Br.23-26. The *Geier* Court, however, specifically rejected the dissent's contention that parties claiming conflict preemption under the Safety Act bear a "special burden" in establishing preemption. 529 U.S. at 872. Instead, the Court held, *ordinary* conflict preemption principles apply—under which "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict." *Id.* at 885.

Congress—which is presumed to be aware of this Court's decisions, *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580-81 (1978)—amended the Safety Act to address seatbelts just two years after *Geier* in enacting Anton's Law. But Congress did not amend the preemption provisions or suggest that it had any disagreement with *Geier*. Considerations of *stare decisis* are of course particularly strong in the statutory context, "where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).[8]

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[8] Petitioners similarly err in suggesting (Br.24) that this Court's decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), changed the ground rules recognized by *Geier* for evaluating preemption claims under the Safety Act. In *Wyeth*, this Court cited *Geier* with approval as an example of where "an agency regulation with the force of law can pre-empt conflicting state requirements," and distinguished *Geier* on the ground that there was "no such

Petitioners also level a more subtle but equally problematic attack on *Geier*. Seeking to strip the Court's decision of any precedential significance, they contend that *Geier* has "no relevance" here because it concerned passive restraint sections of FMVSS 208 adopted during a different rulemaking. Pet.Br.35; *see* Pet.Br.12-16, 21. Of course *Geier* does not explicitly dictate the outcome here, and of course the two rulemakings were different. But this Court usually does not issue decisions that are "good for" one "day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). And far from confining *Geier* to its precise facts, the Court has discussed *Geier* in cases even outside the Safety Act context. *E.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002); *Wyeth v. Levine*, 129 S. Ct. 1187, 1203 (2009).

As the government correctly recognizes, *Geier* establishes the legal framework for resolving this case. U.S.Br.10-12. And as explained below, the parallels between this case and *Geier* are striking—and thus controlling if *Geier* is accorded *stare decisis* effect.

4. This Court's decision in *Geier* was consistent with the government's position in several prior airbag cases. In those cases, the government repeatedly

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regulation" in *Wyeth*. *Id.* at 1200-01. The regulation at issue in this case, like the one in *Geier*, undeniably has the "force of law." Likewise, to the extent that *Wyeth* could be viewed as altering the "ordinary principles of pre-emption" (*Geier*, 529 U.S. at 886) that govern the Safety Act, there is no basis for importing any new preemption principles into the Safety Act years after it was enacted by Congress and interpreted by this Court in *Geier*. And, in any event, "[t]he presumption against preemption of state laws that can coexist harmoniously with federal law is quite different from a presumption in favor of preservation of state laws that conflict with federal law." U.S. *Geier* Br.18 n.13 (Nov. 8, 1999).

advised the Court that "holding a manufacturer liable for a design defect could interfere with the Secretary's efforts to achieve the statutory objective." U.S. *Wood v. General Motors Corp.* Br.11 (Oct. 31, 1989) (No. 89-46). In particular, "when Congress or an agency determines that certain activity must be permitted in order to further the purposes of federal law, state law that would forbid that behavior is preempted." U.S. *Geier* Br.26 (citing cases); *see also* U.S. *Geier* Br.16-17; U.S. *Freightliner* Br.24 (Dec. 13, 1994); U.S. *Wood* Br.8 ("state tort claims that put at risk a specific federal policy promoting motor vehicle safety" are preempted). The government likewise acknowledges in this case that "a conflict results" between federal and state law when an FMVSS provides manufacturers with several options and reflects a policy judgment by NHTSA "that the regulated parties must remain free to choose among those options." U.S.Br.8, 11, 18.

The government has also consistently taken the position that "the mere fact that manufacturers may comply with federal law by installing one of several types of [equipment] does not mean, *standing alone*, that a state tort law action ... is preempted." U.S. *Wood* Br.15 (emphasis added); *see* U.S. Invitation Br.16. Petitioners suggest that the Court of Appeal held—and that respondents maintain—that "mere compliance with an option ... is sufficient to preempt state common law." Pet.Br.26; *see* Pet.Br.27. As the government recognizes, however, that is not accurate. U.S.Br.13-14. The Court of Appeal's decision—like our position—is based on the fact that the choice that NHTSA explicitly gave manufacturers to install a Type 1 or Type 2 belt in the seating positions at issue

embodies a "policy judgment by NHTSA" that would be frustrated by actions like this one. U.S.Br.14.[9]

Thus, while we disagree with the conclusion that the government reaches—and believe it cannot be squared with the legal principles it has long recognized—we largely agree with its basic formulation of the legal inquiry. The key is whether NHTSA's decision to offer manufacturers the choice to install Type 1 or Type 2 belts in rear center/aisle seats was designed to ensure that manufacturers were "free to choose among those options," in order to advance the policy objectives of the Safety Act. U.S.Br.8.

II. PETITIONERS' STATE TORT CLAIMS ARE PREEMPTED BY FMVSS 208

Like every other federal and state appellate court that has addressed the issue, the Court of Appeal below correctly held that petitioners' state tort claims are just as preempted as the claims in *Geier*.

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[9] Petitioners similarly suggest (Br.21) that the decisions holding that suits like the instant one are preempted by FMVSS 208's seatbelt rule rest on an "options only" rationale. Not so. Those decisions are based on the correct conclusion that allowing such actions to proceed would pose an obstacle to the *policy determinations* underlying that rule. *See* Pet.App.16a-18a; *Carden.*, 509 F.3d at 230-31; *Griffith v. General Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002), *cert. denied*, 538 U.S. 1023 (2003); *Hurley*, 222 F.3d at 383; *Roland v. General Motors Corp.*, 881 N.E.2d 722, 728-29 (Ind. Ct. App. 2008); *Heinricher v. Volvo Car Corp.*, 809 N.E.2d 1094, 1098 (Mass. App. Ct. 2004).

A. Petitioners' Theory Of The Case Overlooks Key Parts Of The Record And Is Based On An Unworkable Notion Of Preemption

In *Geier*, this Court considered "[t]he history of FMVSS 208" from 1967 to the 1984 version of the rule, in order to "explain why and how [the agency] sought [to achieve certain policy] objectives" in passing that rule in 1984. 529 U.S. at 875; *see id.* at 875-81. In this case, a central plank of petitioners' argument is that this Court should focus *solely* on the 1989 rulemaking proceeding. Pet.Br.22, 26. The government commits the same mistake. U.S.Br.24 (confining its analysis of child safety concerns to the 1989 rulemaking). But, as in *Geier*, the 1989 version of FMVSS 208 must be considered in light of the *history* of NHTSA's regulation of seatbelts, and not simply a moment in regulatory time. Indeed, to understand why NHTSA refused to alter the status quo in 1989 and require manufacturers to install Type 2 belts in the seating position at issue, one must appreciate what the status quo was—and the "why and how" (*Geier*, 529 U.S. at 875) of the agency's decision to adopt it.

As explained above, the original version of FMVSS 208 gave manufacturers the option to use Type 1 or Type 2 belts in *all* rear seating positions. Regulatory pronouncements over the next decade make clear that this policy choice was based on considerations of safety, technical feasibility, and cost. NHTSA understood that overall seatbelt usage was very low in rear seats, and that Type 2 belts suppressed seatbelt usage among many adults—particularly women. As this Court recognized in *Geier*, NHTSA also was sensitive to the ever present risk that over-aggressive regulation

would produce a public backlash against passenger restraints. *See* 529 U.S. at 879 (noting that refraining from imposing an all-airbag rule would help to build the "public confidence necessary to avoid another interlock-type fiasco") (citation omitted).

Those considerations supported leaving manufacturers free to choose what rear belt mix would best fit the design and passenger profile of a particular vehicle, and underscore that NHTSA was by no means indifferent to state tort theories effectively mandating Type 2 belts in all rear seating positions. NHTSA confirmed as much in 1984 when it specifically rejected (for the first time)—largely on child safety grounds—a proposal that the Type 1/Type 2 option should be eliminated for all rear seats. *Supra* at 7.

Neither petitioners nor the government deny that NHTSA deliberately gave manufacturers the freedom to install Type 1 or Type 2 seatbelts in rear center and aisle seats up to and through the agency's 1984 decision to preserve that option for child safety reasons. Petitioners and the government also do not deny that a state tort claim like this one would have been inconsistent with NHTSA's prior policy determinations, and thus preempted, if asserted in 1985 or even 1988. (If petitioners believe that such claims would not have been preempted then either, it only underscores how far they are asking this Court to go in disregarding the federal objectives of FMVSS 208.) Nevertheless, petitioners and the government ask this Court to put on blinders and decide this case without regard to anything that happened before 1989.

Petitioners assert that "[t]he agency's 1984 objectives with respect to passive restraints have *no relevance* to the 1989 rule governing Type 2 seatbelts

in rear seating positions." Pet.Br.22 (emphasis added). But NHTSA decided in 1989 *to preserve the status quo* for rear center and aisle seats. The 1989 rulemaking record concerning those inboard seats is discussed in the next section, but nothing the agency said in 1989 suggested a radical change in existing policy as to these seats, much less put manufacturers on notice that they suddenly were exposed to state tort claims that would, previously, have been preempted.

Furthermore, it is not even clear—under petitioners' and the government's view of the record—that federal preemption of actions like this one ended promptly in 1989. Petitioners assert that, "*[b]y 1998*, there were technologically feasible ways" to address the agency's prior concerns with mandating installation of Type 2 belts in rear center and aisle seats. Pet.Br.22 (emphasis added); *accord* Pet.Br.18, 41; *see* U.S.Br.28. But they never make a similar claim about 1989—or 1990-91. In other words, petitioners appear to advocate an analysis under which tort claims like theirs suddenly became consistent with federal policy—and *un*-preempted—sometime in the early 1990s, after being preempted for a quarter century, because *in their view* the significant technical and safety challenges that NHTSA identified in the decade or more leading up to the 1989 rulemaking, and in 1989 itself, had all been resolved. According to petitioners, "*[b]y that time*, there were technologically feasible ways of installing Type 2 seatbelts in aisle seating positions." Pet.Br.41 (emphasis added).

This is a truly remarkable theory of preemption, requiring manufacturers making critical design and investment decisions to get by "with the exercise of extraordinary intuition or with the aid of a psychic."

United States v. Chrysler, 158 F.3d 1350, 1357 (D.C. Cir. 1998) (holding that NHTSA failed to give constitutionally adequate notice of what is required by a FMVSS). But preemption that can come and go based on a claimed safety or technological development, or the subsequent discovery of a safety or technical limitation, is unprecedented. And the complete history of FMVSS 208 compels the conclusion that when NHTSA gave manufacturers the explicit option to use Type 1 or Type 2 belts—and then explicitly refused to require manufacturers to install Type 2 belts in rear center/aisle seats—it intended for manufacturers to retain the discretion to make either choice until *NHTSA itself* actually revoked the option.

Indeed, NHTSA's chief counsel confirmed in a letter a year *after* the vehicle in this case was manufactured that "[w]e believe the vehicle manufacturer is in the best position to balance, for its vehicles, the benefits associated with [the] extra protection [afforded by Type 2 belts] against any difficulties related to occupants entering and exiting the vehicle." Letter from Philip R. Recht, NHTSA Chief Counsel, to Roger Matoba (Dec. 28, 1994) ("1994 Chief Counsel Letter").[10] This letter was consistent with concerns that NHTSA had consistently stressed leading up to the 1989 rulemaking in refusing to *force* manufacturers to install Type 2 belts in rear center/aisle seats. And the letter underscores that NHTSA "'affirmatively and deliberately'" (U.S.Br.12 (quoting *Geier*, 529 U.S. at 878) sought to ensure that

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[10] This letter—which responded to an individual who claimed that installing Type 2 belts in rear aisle seats was unsafe—is available at http://isearch.nhtsa.gov/files/10243.html.

manufacturers had the option to install a Type 1 or Type 2 belt in the seating position at issue.

B. The History Of FMVSS 208 Reflects A Deliberate Judgment To Preserve A Manufacturer Choice For Rear Center And Aisle Seats

NHTSA's 1989 decision to preserve the express option to install a Type 1 or Type 2 belt in rear center/aisle seats was the product of a deliberate policy judgment based largely on the same set of federal objectives underlying the analogous option at issue in *Geier*—namely, safety, technical issues, costs, and public acceptance. 529 U.S. at 878-79.

Child Safety

Petitioners argue that "child safety had *nothing* to do with NHTSA's 1989 decision not to mandate Type 2 seatbelts for center and aisle seating positions." Pet.Br.23 (emphasis added); *see* Pet.Br.45 (arguing that the regulatory history "emphatically refutes this theory"); *see also* U.S.Br.24 (arguing that child safety concerns were absent from the 1989 rulemaking). That contention is seriously mistaken.

While NHTSA anticipated that the benefits of its Type 2 mandate for rear *outboard* seats would largely fall upon adults and older children, the most common occupants of rear *inboard* seats were younger children. *See* Jeya Padmanaban et al., *Kid in the Middle: A Discussion of Effectiveness of Center Rear-Seat Restraint Systems* 3 (2006), *available at* http://jpresearch.com/Docs/Final%20AAAM%202006.pdf (noting that "children 2-14" have the "highest occupancy rates" in rear center seats); Lawrence E. Decina et al., NHTSA, DOT HS 810 679, *Child Restraint Use Survey LATCH Use and Misuse* at 2,

35 (Dec. 2006) (noting that "the center-rear seat" is "the position long recommended to parents because of its distance from potential points of impact"). NHTSA was well-aware of this baseline when it entered into its 1989 rulemaking process. Throughout the 1980s, the agency itself had affirmatively encouraged parents to situate their young children in the rear center seat—which NHTSA touted as the "safest" position for a child. *See, e.g.*, 45 Fed. Reg. 81,625, 81,627 (Dec. 11, 1980); 50 Fed. Reg. 27,633, 27,636 (July 5, 1985).

Remarkably, both petitioners and the government ignore that NHTSA made clear—both before and during the 1989 rulemaking—that Type 2 belts were *unsafe* for this key group. *See, e.g.*, 45 Fed. Reg. at 81,627 ("[C]hildren in the age group 5-12 ... may be too short to use shoulder belts designed for adults."); 53 Fed. Reg. at 47,989 ("Many of these children are not yet big enough to use the shoulder belt in the rear seat, even when they slide as far inboard as possible, since it could pass over their neck or face."). Thus, NHTSA expressly directed that, if a child was in a seat with a Type 2 belt, "the shoulder belt should be routed behind the child, and the child should be protected *only by the lap belt*." 53 Fed. Reg. at 47,988 (emphasis added).[11]

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[11] NHTSA now warns parents that they should "**NEVER** put the shoulder belt under the child's arm or behind the child's back," as it can cause misplacement of the lap portion of the belt that in turn can cause "internal injuries in a crash." NHTSA, *Safety Tip #3: Traveling Safely With Preschool & School-Age Children* http://www.nhtsa.gov/people/injury/childps/newtips/pages/Tip3.htm (last visited Sept. 20, 2010); Matthew P. Reed et al., NHTSA, *Assessing Child Belt Fit, Volume 1: Effects of Vehicle Seat and Belt Geometry on Belt Fit for Children with and without Belt Positioning Booster Seats* at 57 (Sept. 2008), *available at* http://deepblue.lib.umich.edu/bitstream/2027.42/64459/1/102442.pdf.

In addition, most child restraints in 1989 (and for several years afterward) were compatible with lap-only belts, but could be used with lap/shoulder belts only with difficulty. *See* NHTSA, *Child Passenger Safety Resource Manual* 88 (Mar. 1992) (stating that the "center rear seating position," which almost always has a lap belt, "usually poses fewer compatibility problems [for child restraints]"); 56 Fed. Reg. at 3064 ("[T]he safest position for the child restraint (the center rear position) *will not be equipped with shoulder restraints.*") (emphasis added); Comments of Mercedes-Benz of North America, Inc., *Re: Notice 1, FMVSS "Occupant Crash Protection,"* NHTSA-87-08-N01-021 ("Due to the extremely low occupancy-rate of the rear-center seat by adults, plus an improved suitability for fastening child restraint systems, the rear-center seating positions are equipped with lap belts.").

Respondents argue that NHTSA believed that lap/shoulder belts would provide better protection for children when restrained in booster seats. Pet.Br.46. But they neglect to note that NHTSA specifically "acknowledge[d] that many parents do *not* use booster seats to protect their children." 53 Fed. Reg. at 47,988 (emphasis added). In fact, NHTSA's own 1994 research affirmed that only *0.8%* of children aged 6-12 sat in a child or booster seat, in contrast to the over 55% who sat in seatbelts—roughly half of whom sat in Type 2 belts, notwithstanding NHTSA's warnings. NASS Study at 6. In 1989, booster seat usage for children riding in vehicles was thus the *exception* rather than the rule.

Petitioners emphasize the agency's statement in 1988 that "*this proposal* for rear seat lap/shoulder belts would ... have no positive or negative effects on

children riding in most designs of car seats and children that are too small to use shoulder belts." 53 Fed. Reg. at 47,984 (emphasis added). But "this proposal" carved out *rear center seats*—the seats most likely to be occupied by younger children. Rather, NHTSA had concluded "that it should limit the proposed requirement for lap/shoulder belts in rear seats to *outboard* seating positions *only*." *Id.* at 47,984 (first emphasis added). Petitioners also gloss over the fact that NHTSA's predictions depended on the agency's view that parents could convert a Type 2 belt *back* into a make-shift Type 1 belt. *See id.* at 47,988.

Indeed, by 1994, NHTSA repudiated its views that Type 2 belts would enhance child safety in traditional booster seats. Instead, it determined that it "does not know of any shield-type booster seat that performs well ... with a lap/shoulder belt system" when the shoulder belt is "left in front of the child." 59 Fed. Reg. at 37,173. Likewise, it concluded that placing a Type 2 belt's shoulder component behind the child's head would *increase* the dangers of lap/shoulder belts for children. *See supra* at n.11. And in 2002, NHTSA abandoned reliance on Type 2 belts for child car seats altogether and instead adopted the LATCH system. *See* 64 Fed. Reg. at 10,788.

For similar reasons, the government's reliance on the agency's alleged failure to expressly "endorse the notion that child safety depended on the continued availability of Type 1 seatbelts," U.S.Br.26, is unpersuasive. Because the agency had already decided to preserve the status quo in rear center and aisle seats, 53 Fed. Reg. at 47,984, there was simply no need to set out at length the child safety benefits of *preserving* a Type 1 belt in those seats. Instead, and

understandably, NHTSA focused primarily on the safety consequences for an *outboard* Type 2 seat requirement. This argument is thus another way in which the government's (and petitioners') efforts to zero in on the 1989 rulemaking—with no appreciation for the *status quo* NHTSA preserved in 1989 for rear center/aisle seats—fundamentally skews the analysis.

Aisle Seat Safety

Importantly, the regulatory record also reflects that NHTSA had at least two safety and design concerns with use of Type 2 belts in the specific rear seat at issue here—the inboard *aisle* seat. First, using Type 2 belts in that position created "potential ingress/egress problems ... for those more rearward seats," because the shoulder strap usually had to stretch across the aisleway to be properly anchored. 69 Fed. Reg. at 70,905; *see* 55 Fed. Reg. at 30,915. And second, "attaching belt anchorages to the side of the vehicle could cause a lap/shoulder belt to fit its user poorly." 69 Fed. Reg. at 70,905. These problems persisted for some manufacturers for over a decade, finally leading NHTSA in 2004 to allow manufacturers to install detachable lap/shoulder belts for these seats, rather than integrated Type 2 belts. *Id.* at 70,909.

NHTSA "encourage[d]" manufacturers to find ways to address these problems and install Type 2 belts—"in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways *without interfering with the aisleway's purpose of allowing access to more rearward seating positions.*" 54 Fed. Reg. at 46,258 (emphasis added). But as NHTSA's own chief counsel confirmed, NHTSA concluded that manufacturers were in "the best position" to determine whether a

Type 2 belt could be designed and installed without such interference. 1994 Chief Counsel Letter, *supra*.[12]

Technical Challenges, Costs, Public Acceptance And Additional Safety Implications

NHTSA also recognized that a Type 2-belt *mandate* in rear center seats would force carmakers either to overcome costly technical challenges or to compromise safety or vehicle performance. As commenters pointed out during the 1989 rulemaking, because rear center seats were "not presently required to even have anchorages for shoulder belts," 53 Fed. Reg. at 47,984, a Type 2 mandate would have necessitated "structural changes ... [that could] result in disruptions of the vehicle's cargo carrying area or impede the driver's rearward vision," *id.* The agency found these technical concerns credible, "agree[ing] with those commenters

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[12] Different makes and models presented different challenges. For example, during the 1989 rulemaking Mazda told NHTSA that a "mandatory" Type 2-belt requirement for "rear center seating positions" would create "enormous complexities" and "cause the loss of the rear seat fold-down and package tray removal features currently provided on many models." Comments of Mazda (North America), Inc. Research & Development Center, *Re: Request for Comments—ANPRM—FMVSS 209 and 210, Occupant Crash Protection and Seat Belt Assembly Anchorages*, 87-08-NOI-028 (July 28, 1987). Since those features were "absolutely necessary to facilitate cargo carrying, a major function of [multi-passenger vehicles]," Mazda also advised that "[t]he loss of these features will force Mazda to consider the elimination of the center rear seating position." *Id.* To be sure, not all vehicles presented such challenges. But in a competitive market, vehicle designs even within a particular class of cars can vary significantly—all of which underscores the wisdom of the agency's decision to leave to the manufacturer, for its vehicles, the determination of when the installation of Type 2 belts in rear aisle seats was feasible and appropriate. 1994 Chief Counsel Letter, *supra*.

that asserted that there would be more technical difficulties" from a requirement for Type 2 belts in rear center seats. *Id.* Even the American Seat Belt Council was hostile to such a requirement, finding that "lap/shoulder belts in rear center seating positions had low cost-effectiveness and little field testing." *Id.*

Ultimately, NHTSA concluded that "[w]hether or not those [technical] difficulties could be overcome, there would be small safety benefits and substantially greater costs if rear seating positions that are not outboard were required to have lap/shoulder belts." *Id.* at 47,984-85. NHTSA estimated that requiring Type 2 belts in rear center seats would cost $109 million in passenger cars and $42 million in MPVs and light trucks on an *annual*, industry-wide basis. In contrast, after studying almost 200,000 injuries to rear passengers, NHTSA concluded that requiring lap/shoulder belts in *all* rear seats "in light trucks and MPV's can reduce 55 moderate to serious injuries, but would bring about *no reduction in fatalities.*" 52 Fed. Reg. at 22,820 (emphasis added). NHTSA thus found the costs to be "extremely disproportionate to the possible safety benefits." *Id.* at 22,819-20.

This was significant, because NHTSA's experiences had taught it that low-benefit, high-cost mandatory rules generally led to a public backlash and problems with public acceptance, which had previously proven detrimental to its safety objectives. *See* 46 Fed. Reg. at 53,424; 49 Fed. Reg. 28,962, 28,996-97 (July 17, 1984); *see also Geier*, 529 U.S. at 878 (giving industry time to overcome "safety problems and ... high production costs" builds public confidence and acceptance).

After "examining the cost-effectiveness of several existing passenger car crashworthiness standards," the

agency also found that the other standards were "from 20 to 160 times more cost-effective" than would be a rear seat lap/shoulder belt requirement. 52 Fed. Reg. at 22,819. Of course, after learning that 99.4% of all cars would have lap/shoulder belts in rear outboard seats anyway, the agency determined that the cost of mandating Type 2 belts in rear *outboard* seats was more manageable, only $790,000 for passenger cars. 53 Fed. Reg. at 47,991; 54 Fed. Reg. at 25,276. The cost of requiring Type 2 belts rear center and aisle seats, in contrast, remained orders of magnitude greater.

C. Tort Suits Like This One Would Frustrate Accomplishment Of The Policies Embodied By FMVSS 208

1. After considering these factors, NHTSA required Type 2 belts in rear *outboard* seats—which did not present the same safety concerns involving children, raised few technical problems, and could be installed at a fraction of the cost—but deliberately left manufacturers "free to choose" (U.S.Br.8) Type 1 or Type 2 belts in rear center and aisle seats. That determination—which is embodied in FMVSS 208—reflected NHTSA's considered judgment about the safety, technical feasibility, costs, and benefits of Type 1 versus Type 2 belts for rear center and aisle seats, shaped by years of rulemaking proceedings, hundreds of industry and consumer comments, and institutional expertise. Allowing petitioners' state tort claims to proceed would require juries to weigh the same factors and leave juries free to impose the very rule that the expert agency rejected in 1984, and again in 1989.[13]

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[13] California law, for example, provides that, "in evaluating the adequacy of a product's design," a jury may consider factors such

That tort law regime would frustrate the policy judgment embodied in FMVSS 208 that granting manufacturers the option of installing a Type 1 or Type 2 belt was the appropriate way to best promote the objectives of the Safety Act, including safety. *See* U.S. *Wood* Br.6-7, 14-15 (explaining how tort regime would frustrate NHTSA policy regarding airbags); *see also Hurley*, 222 F.3d at 382 ("The point is that, as in *Geier*, the decision to leave options open to .... manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective ...."). For example, a state rule mandating Type 2 belts in rear center/aisle seats would create added safety concerns for many children (*e.g.*, those who were not properly seated in a booster); create unique vehicle safety risks to other passengers (*e.g.*, those in the back row) if Type 2 belts were not installed without significant structural changes to vehicles; force manufacturers to make enormously costly changes with at best marginal safety gains; and invite the public backlash that is often sparked by mandating an overly costly design requirement.

As in *Geier*, this conclusion is particularly stark given that the agency specifically *refused* to adopt the "all Type 2-belt rule" that petitioners now seek to impose through state tort law in acting on petitions that would have required the installation of Type 2 belts in rear seats. *See* 529 U.S. at 879; *see also* U.S.

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as "the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978). California is by no means unique in the factors it asks juries to weigh in such suits.

Wood Br.15 ("What distinguishes this issue from most is that the Secretary determined not simply to allow either automatic belts or airbags, but that an all airbag rule would *disserve* the *safety* purposes of the Act."). The government says that NHTSA "did not 'consider and reject' any imposition of a higher safety standard." U.S.Br.19-20 (quoting *Wyeth*, 129 S. Ct. at 1203 n.14). But in 1989, NHTSA unquestionably *did* reject imposition of a Type 2-belt requirement for rear center/aisle seats—a "higher" standard, in the government's view. Indeed, NHTSA "modified" the proposed rule in 1989 to *eliminate* such a requirement for rear aisle seats. 54 Fed. Reg. at 46,258.

Pointing to *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), petitioners argue that NHTSA's refusal in 1984—and again in 1989—*not* to impose the same "all Type-2 belt requirement" that they now seek to impose through state tort law is irrelevant. Pet.Br.42-43. But *Sprietsma* dealt with the quite different situation in which the federal agency had decided not to regulate *at all* in the pertinent area (propeller guards). 537 U.S. at 54. Here, as in *Geier*, the agency's refusal to impose the regulatory requirement at issue arose in the context of a comprehensive federal program that already regulated the precise equipment at issue. *See* U.S. *Sprietsma* Br.19 ("*Geier* considered the preemptive effect, not of an agency's failure to regulate, but of an existing federal safety standard that addressed in some detail the subject of motor vehicle passive restraint devices."). Moreover, an agency's decision not to regulate in an area is a far cry from a decision to retain an existing rule (as NHTSA did for rear center and aisle seats). Accordingly, this case—

like *Geier*—stands in "sharp contrast" to *Sprietsma*. 537 U.S. at 67; *see also Carden*, 509 F.3d at 232.[14]

2. Petitioners argue that the rule at issue cannot be preemptive because the FMVSSs are generally defined as "minimum" standards. Pet.Br.27-28. The plaintiffs and the dissent in *Geier* made the same argument about the passive restraint options under FMVSS 208. 529 U.S. at 874. And the *Geier* majority rejected that argument, holding that while most FMVSS requirements may establish only a floor, some grant manufacturers options that are protected by preemptive federal law. *Id.* at 874-75. *Geier* thus resolves that a FMVSS can serve as more than just a minimum federal standard in order to achieve policy objectives of the Act—and have preemptive effect.

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[14] There also are important differences between the statutory regimes in *Sprietsma* and in this case. The Federal Boat Safety Act of 1971 provides that the Coast Guard *may* prescribe "minimum safety standards," but only after consulting with an advisory council and considering various criteria including existing "recreational vessel safety standards" and "the need for and the extent to which the regulations will contribute to recreational vehicle safety." *Sprietsma*, 537 U.S. at 57-58 (citing 46 U.S.C. §§ 4302, 13110). In the Coast Guard's view, that "regulatory process is very structured and stringent regarding justification," such that the appropriate response to uncertainty was to refrain from regulation. *Id.* at 66. The Coast Guard had already made clear that when it *did not* issue a federal standard it always intended to leave state law undisturbed. *See id.* at 59-60. This Court recognized that "the Coast Guard's entire explanation for its decision ... reveals only a judgment that the available data did not meet [its] 'stringent' criteria for federal regulation," and *did not* represent a "deci[sion] that, as a matter of policy, the States and their political subdivisions should not impose some version of propeller guard regulation." *Id.* at 66-67.

The government suggests that FMVSS 208 just sets a "minimum" federal standard of "at least" a Type 1 belt. U.S.Br.9. But that is certainly not what the regulation says. And if NHTSA had wanted to establish a Type 1 belt minimum, then the reference to Type 2 belts in the regulation is pure surplusage, *cf. Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment"). The fact that NHTSA explicitly gave manufacturers the option of installing a Type 1 or Type 2 belt in the seating positions at issue strongly suggests that the agency had a different kind of rule in mind than a simple minimum standard such as the federal standard for roof strength, 49 C.F.R. § 571.216, or anti-lock brakes, *id.* § 571.105. And of course, critically, as in *Geier*, the regulatory history confirms just that.

Moreover, the government is wrong to assume that a Type 2 belt is necessarily more protective than a Type 1 belt, as its attempt at formulating a "minimum" standard implies. For example, as discussed, Type 2 belts posed unique safety risks for children—who are most likely to be seated in rear center seats—and women.[15] Installation of Type 2 belts in the rear aisle

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[15] *See, e.g.*, James M. Lynch et al., *Direct Injury to the Cervical Spine of a Child by a Lap-Shoulder Belt Resulting in Quadriplegia. Case Report*, 41 J. Trauma, Injury, Infection, & Critical Care 747, 749 (1996) (noting case where six-year-old child suffered spinal injury due to "shoulder component of a lap-shoulder seat belt [which] resulted in quadriplegia" and concluding that "[t]his case demonstrates that built in three-point restraint devices, designed for the 'smallest' adult, may have inherent injury potential to the in-between-aged child"); *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1312 (11th Cir. 2005) (small-statured

seat also posed unique risks to passengers in the back row. *Supra* at 33. Under petitioners' position, a manufacturer thus might be subject to one state tort action for failing to install a Type 2 belt (as here) and another for failing to install a *Type 1* belt, such as where a child was injured by a shoulder belt, or a passenger in the back seat of a minivan who had difficulty exiting a vehicle after a crash, was injured. Especially in these circumstances, it makes perfect sense that the agency would grant manufacturers the option of installing either seatbelt type in these seats.

3. Petitioners and the government make much of NHTSA's statement in 1989 that it "encouraged" manufacturers to install Type 2 belts in rear aisle seats when feasible, and argue that allowing state tort actions like the instant one would actually advance that objective. Pet.Br.22; U.S.Br.17, 21, 28. The government goes further and suggests that NHTSA would have been perfectly happy if manufacturers had "*immediately* installed Type 2 seatbelts" in the seating positions at issue. U.S.Br.8 (emphasis added). There are several fundamental problems with this argument.

First, it ignores what NHTSA actually said. The pertinent passage did not "encourage" manufacturers to install Type 2 belts at all cost—and without regard to safety. 54 Fed. Reg. at 46,258. It "encouraged" manufacturers to do so only "in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways *without interfering with the aisleway's purpose of allowing access to more rearward seating positions.*" *Id.* (emphasis added). NHTSA's objectives

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woman claimed that vehicle's "shoulder belt improperly fit shorter passengers" and caused severe "spinal cord injury" in accident).

would have been frustrated if manufacturers had been forced "immediately" (U.S.Br.8) to install Type 2 belts in aisle seats before they could resolve the safety and technical issues that the agency had recognized.[16]

Second, encouraging *manufacturers* to install Type 2 belts in rear aisle seats as soon as they could resolve the safety and technical issues NHTSA had identified in its rulemaking is quite different than empowering lay juries to require the installation of Type 2 belts (via multimillion dollar damages awards) when *they* saw fit. Manufacturers occupied a unique vantage point to make that determination for their vehicles, especially given the variations among vehicle designs. And as late as 1994, NHTSA's own chief counsel made clear that, in NHTSA's view, the "*vehicle manufacturer* is in the best position" to decide when installation of Type 2 belts was safe and appropriate in those seats. 1994 Chief Counsel Letter, *supra* (emphasis added). That statement directly repudiates the government's suggestion that NHTSA would have been happy if juries had simply mandated Type 2 belts in those seats.

Third, *Geier* underscores that the fact that NHTSA "encourages" one option does not mean that it is indifferent to state tort claims effectively mandating that option. When NHTSA adopted the 1984 version of FMVSS 208 the general consensus was that airbags were a safer passive restraint than the other available

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[16] As the government acknowledges, U.S.Br.28, NHTSA was quite comfortable *requiring* lap/shoulder belts where it believed that identified technical challenges could be overcome. *Cf.* 53 Fed. Reg. at 47,986 (concluding "there may be some difficulties with installing rear lap/shoulder belts in some particular models" of MPVs, but mandating Type 2 belts anyways since "NHTSA has no reason to believe that these difficulties cannot be overcome").

options. 49 Fed. Reg. at 28,986. And NHTSA affirmatively "encourage[d]" manufacturers to install airbags in a much more concrete way than a line in the *Federal Register*: it gave manufacturers "a form of extra credit for airbag installation." 529 U.S. at 879; *see id.* at 891-92 (dissent). Nevertheless, this Court held that state tort claims that would effectively impose an "airbags only" rule were preempted. *Id.* at 886. The same conclusion follows here.

The plaintiffs and dissent made a similar argument in *Geier*, in suggesting that "as far as FMVSS 208 is concerned, the more airbags, and the sooner, the better." *Id.* at 874; *see* U.S.Br.14. But this Court rejected that argument in *Geier*, concluding that the agency had taken a different approach—by giving manufacturers the option to install different types of devices—in order to advance policy objectives of the Safety Act and thereby, for example, "lower costs," "overcome technical safety problems," and "win widespread consumer acceptance." 529 U.S. at 875. So too here. Indeed, that conclusion is even stronger. Everyone essentially agreed that "to be safe, a car must have an airbag." *Id.* at 886. Yet in 1989, and thereafter, serious questions existed as to whether Type 2 belts were in fact safer in rear center/aisle seats, especially for children and for passengers in the back row whose access could be impeded.

4. Petitioners and the government also seek artificially to narrow the policy considerations that this Court may consider in determining whether an actual conflict exists. Thus, for example, as discussed above, they misinterpret the administrative record on safety concerns and erroneously suggest that the Court should disregard anything that is not in the 1989

rulemaking. But they go even further when it comes to aisle seat safety and cost-benefit considerations.

First, the government defensively suggests (Br.20-21) that this Court should simply disregard the unique safety issues presented by Type 2 belts *in the very seat involved in this case*—the rear aisle seat where Thanh Williamson was sitting at the time of the accident, Pet.Br.16—on the theory that respondents have not adequately raised this point. But respondents specifically raised this argument below, Cal.App.Resps.Br.18 (discussing "[i]mpairment of ingress and egress for multipurpose passenger vehicles with aisles"), as well as at the certiorari stage, Supp.Br.7, and made clear in their opposition brief what seat was at issue, Opp.9. Moreover, respondents "may, of course, defend the judgment below on any ground which the law and the record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). Thus, there is no reason for the Court to disregard this important piece of the administrative record—and the added safety concerns presented by the installation of Type 2 belts in rear aisle seats alone provides an adequate basis to conclude that lawsuits like this one seeking to mandate Type 2 belts in those seats are preempted.[17]

Second, petitioners and the government advance the broad proposition that cost-benefit considerations cannot justify federal preemption. Pet.Br.42; *see* U.S.Br.19. As petitioners acknowledge, however, "the Safety Act *requires* NHTSA 'to consider factors such as feasibility and cost in issuing motor vehicle safety

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[17] Of course, it is true that the fact that rear aisle seats present unique safety concerns narrows the issue before this Court. That was an appropriate reason to deny certiorari. Supp.Br.9. But it is no reason to disregard the case actually before the Court.

standards." Pet.Br.42; *see* 49 U.S.C. § 30111(a) (FMVSSs must be "practicable"). Cost-benefit considerations are just as legitimate a federal policy embodied in the Safety Act as safety, and this Court specifically credited the agency's cost-benefit consideration in *Geier*. 529 U.S. at 878; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983) ("The agency is correct to look at the costs as well as the benefits of Standard 208.").

Moreover, cost considerations are intertwined, in the long run, with NHTSA's safety mission—as this Court recognized in *Geier*. 529 U.S. at 875 ("FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance—*all of which would promote FMVSS 208's safety objectives.*") (emphasis added). The agency made clear in the rulemaking leading up to the agency's refusal to require manufacturers to install Type 2 belts in the seating positions at issue that "[r]equiring significant industry and agency resources to be spent for relatively little safety gain can result in a lost opportunity to better improve vehicle safety through other means, such as improved frontal or side impact protection." 52 Fed. Reg. at 22,819. It also recognized that cost considerations would heavily influence public acceptance. *See* 49 Fed. Reg. at 28,996-97; 46 Fed. Reg. at 53,424; *see also Geier*, 529 U.S. at 879 (giving industry time to overcome "safety problems and ... high production costs" builds public confidence).

This Court has refused to treat cost-benefit concerns as an illegitimate or second-class policy consideration even under statutes far less explicit about the role of cost-benefit analysis than the Safety

Act. *See, e.g., Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (reaffirming EPA's authority to weigh costs against benefits under the Clean Water Act). In accordance with its statutory mandate, NHTSA properly took those considerations into account in refusing to require manufacturers to install Type 2 belts in rear center and aisle seats. And neither petitioners nor the government have provided any reason to disregard statutorily mandated cost-benefit considerations in gauging conflict preemption.[18]

5. Petitioners and the government also argue that preemption is off the table because "NHTSA was not seeking to encourage *variety* in seatbelt design or to foster a *mix* of Type 1 and Type 2 seatbelts." U.S.Br.17 (emphasis added); *see* Pet.Br.36. The premise of that argument is mistaken. When, as here, an agency creates an equipment option based on an express recognition that there are serious tradeoffs for designing a vehicle one way or the other, it invariably will foster a mix or variety of equipment designs as manufacturers exercise the option and compete in the marketplace. And that is what happened. Some manufacturers installed Type 2 belts in rear center/aisle seats while others installed Type 1 belts, and those that did install Type 2 belts in those seats solved the technical problems in different ways often depending on the vehicle type or configuration.

Moreover, in this context at least, variety is not an end to itself. In *Geier*, this Court noted that NHTSA

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[18] The government's reliance (Br. 23) on *Sprietsma* is misplaced. In *Sprietsma*, the Court did not say that cost-benefit considerations are irrelevant for conflict preemption; rather, the Court simply held that the agency decision at issue did not conflict with federal objectives. 537 U.S. at 67; *supra* at 38-39.

had concluded that "a mix of [passive restraint] devices" would, among other things, "allow the industry time to overcome the safety problems and high production costs associated with airbags" and "build public confidence" and acceptance. 529 U.S. at 879. As discussed above, NHTSA's decision to grant manufacturers the option of installing a Type 1 or Type 2 belt in rear center/aisle seats was intended to achieve the same ends, not to mention advance safety, by permitting manufacturers to strike the balance that made the most sense for their vehicles. *Supra* at 29-36.

In any event, for purposes of determining whether common law actions would stand as an obstacle to the accomplishment of federal law, there is nothing talismanic about an agency's effort to encourage a "variety or mix" of equipment types (Pet.Br.36). Rather, as the government recognizes, the key is whether the agency intended to leave manufacturers "free to choose" among options in order to advance policy objectives under federal law. U.S.Br.8. Indeed, it would be strange to say that the *only* time that an option can be preemptive under the Safety Act is when it is intended to foster a "variety or mix" of different equipment options, given that creating a "variety or mix" of options is not a federal objective under that Act but rather just a *means* of advancing policy considerations like safety and technical feasibility that *are* ends of the Safety Act. And nothing in *Geier* compels such an unusual preemption rule.[19]

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[19] Petitioners point out that in passing the 1989 amendments to FMVSS 208, NHTSA did not create a federalism assessment pursuant to Executive Order 12612. *See* 54 Fed. Reg. at 46,265-66; *id.* at 25,278. But that Order focused on the "effect" of new laws or regulations. 52 Fed. Reg. 41,685, 41,687-88 (Oct. 30, 1987).

D. The Government's Position Does Not Merit Deference

Petitioners rely heavily on the government's position that their tort claims are not preempted, and claim that this position is entitled to "special weight." Pet.Br.22, 32; *see* U.S.Br.29 ("considerable weight"). That is incorrect. This Court has held that the government's views are entitled –at most—to "some weight" in this context, and even that weight depends on the "thoroughness, consistency, and persuasiveness" of the government's position. *Wyeth*, 129 S. Ct. at 1201 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). For several reasons, the government's position in this case does not merit deference.

First, here, as in *Geier*, the regulatory history "is clear enough" that the government's view is beside the point. 529 U.S. at 886; *see also Wyeth*, 129 S. Ct. at 1203 (stating that the Court conducts its "own pre-emption analysis" and only then "consider[s] the agency's explanation of how state law interfere[s] with its regulation"). Moreover, on the regulatory record before the Court, this case is governed by *Geier*. And the government is of course not entitled to any deference when it comes to the proper interpretation of this Court's decisions. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000).

Because state tort claims for failure to install Type 2 belts in rear center/aisle seats already were preempted before the 1989 regulation, the 1989 amendment (which maintained the status quo for those seats) had no further effect on state law for the agency to assess. Moreover, the absence of such an assessment hardly overcomes the significant evidence that a Type 2 mandate for rear center/aisle seats would actually conflict with federal objectives.

Second, the government's position is "inherently suspect." *Wyeth*, 129 S. Ct. at 1201. In *Geier* and two prior cases (*Wood* and *Freightliner*), the government mapped out its position that, when NHTSA "determines that certain activity must be permitted in order to further the purposes of federal law, state law that would forbid that behavior is preempted." U.S. *Geier* Br.26; *see supra* at 3. But the government then sat idle for nearly a decade as one court after another held that FMVSS 208 preempted state tort actions based on failure to install a Type 2 belt, given the policy objectives NHTSA sought to further by leaving manufacturers free to choose between Type 1 and Type 2 belts. NHTSA could have clarified its views by regulation, or at least filed an *amicus* brief in any of those cases, if it had thought them inconsistent with federal policy. It did not. The government's position in this case comes out of thin air.[20]

The natural conclusion—especially given the high-profile and high-stakes nature of this issue for the industry—is that the government believed those decisions were right then, and only recently changed its position on the preemptive effect of FMVSS 208. That conclusion is supported by the intervening issuance of the President's 2009 directive against preemption. 74 Fed. Reg. 24,693 (May 22, 2009). And

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[20] In *Geier*, this Court noted that the government had consistently taken the position that FMVSS 208 preempted state tort claims for failure to install an airbag. 529 U.S. at 883. This case, however, represents the first time the government has taken a position on FMVSS 208's preemptive effect in a rear seatbelt case, much less a rear aisle seatbelt case. As a result, the government's views are hardly entitled to weight on the basis of any "consistency" rationale. *Wyeth*, 129 S. Ct. at 1201.

indeed, petitioners' own *amici* argue that, after President Obama's election, "shifting political tides" ended NHTSA's preemption assertions. Public Justice Br.19. The Executive is, of course, free to change its views on the appropriate reach of federal law, but the agency's "newfound" and "recently adopted" positions "on state law are inherently suspect in light of this" purely political development. *Wyeth* 129 S. Ct. at 1203, 1204, 1201; *see also, e.g., Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 356 (2000).

Third, given the peculiar retrospective nature of the question presented—which focuses on the preemptive impact of a now defunct rule adopted more than a decade ago—the government is effectively seeking deference for its interpretation of a historical judgment made by NHTSA more than a decade ago. The government does not enjoy any institutional advantage in telling (or reconstructing) such history. And the government's brief represents scarcely more than a "*post hoc* rationalization[]" for agency action, which is not entitled to deference. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

Finally, the government's position is contradicted by the agency record and simply unpersuasive. For example, as discussed above, the government ignores NHTSA's recognition that Type 2 belts create particular dangers for children and that Type 1 belts worked better with most child restraint systems; the government erroneously suggests that this Court should categorically disregard the unique safety concerns presented by the installation of Type 2 belts in rear aisle seats, U.S.Br.20-21; the government wrongly claims that NHTSA would have been perfectly happy with a rule requiring manufacturers

immediately to install Type 2 belts in rear center/aisle seats and does not acknowledge the 1994 letter of NHTSA's chief counsel refuting that view, U.S.Br.8-10; *see also* U.S.Br.17-18; and the government mistakenly argues that a federal agency's policy judgment can never preempt state law if it rests on cost-benefit considerations, U.S.Br.8-9, 23.

Accordingly, as the Court concluded in *Wyeth* and *Shanklin*, the government's position is not entitled to deference—and cannot carry the day for petitioners.

III. CONGRESS DID NOT INTEND THE ARBITRARY REGULATORY REGIME ENVISIONED BY PETITIONERS

The Congress that passed the Safety Act could not possibly have intended the arbitrary and penal regulatory regime envisioned by petitioners and the government—in which manufacturers could invest millions in designing their vehicles based on a federal rule that explicitly gave them the option of using specific equipment types, for particular policy reasons under the Act, only to find out years later that they could be hit with massive tort liability in state court for installing one of those very types. *See supra* at n.12 (example of the type of fundamental structural changes that a Type 2 mandate could trigger for a vehicle).

In passing the Safety Act, Congress appreciated that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry" presented unique concerns. S. Rep. No. 89-1301, at 12, 1966 U.S.C.C.A.N. at 2720. As this Court explained in *Geier*, the Act preserves state tort lawsuits that are consistent with federal safety standards. But the Court made equally clear that state tort actions that conflict with the federal standards promulgated under

the Safety Act are preempted. And it is vitally important for the industry to be able to rely on the supremacy of federal law in making the investment decisions necessary to design and make vehicles in a "centralized, mass production" fashion.

There are plenty of important policy reasons that NHTSA might want manufacturers to have design choices in a particular area—including a recognition that there were safety tradeoffs, cost-benefit considerations and public acceptance concerns, and a determination that manufacturers are in a better position than anyone else to balance various tradeoffs in light of a particular vehicle's design and likely passenger mix. State tort actions eliminating such choices can directly frustrate those federal objectives—and prove "counterproductive." U.S.Br.10.

Petitioners' position would put manufacturers in an impossible situation. NHTSA studied the various tradeoffs between Type 1 and Type 2 seatbelts for decades, gave manufacturers the option of installing one or the other in rear center and aisle seats, and specifically refused to require manufacturers to install Type 2 belts in those seats—twice. Manufacturers have to build cars for the U.S. market as a whole, and naturally believe that they can rely on NHTSA's seemingly authoritative resolution of contentious safety issues involving difficult tradeoffs—especially when, as here, they are spelled out in a FMVSS.

According to the government, there are more than one million cars on the road "equipped with some Type 1 seatbelts, any one of which could potentially become the subject of a tort suit like this one." U.S. Invitation Br.19. If this lawsuit is not preempted, then presumably neither is a lawsuit predicated on the

premise that *Type 1* belts should have been mandated. After all, NHTSA was still receiving regulatory proposals that it ban Type 2 belts from aisle seating locations because of ingress/egress concerns in 1994. So petitioners' rule would put manufacturers in a "damned if you do, damned if you don't" predicament.

To make matters worse, petitioners and their *amici* offer manufacturers (and courts) no clear principle to discern when preemption stops or starts. As discussed, they appear to argue that petitioners' lawsuit became un-preempted at some point before 1993—not because of anything NHTSA *did*, but because of purported technological developments that NHTSA itself had not evaluated. That approach to preemption raises serious due process concerns, *see Chrysler*, 158 F.3d 1350, and is entirely too fickle and capricious to provide the certainty needed to design and mass produce a vehicle.

In the decade since *Geier*, the lower courts have uniformly recognized that state lawsuits premised on a supposed duty to install Type 2 belts in all rear seats are inconsistent with the choice NHTSA deliberately gave manufacturers in FMVSS 208. The industry has relied on *Geier* and this judicial consensus in making numerous difficult design decisions. There is no reason for this Court to upset the apple cart now. And doing so would only expose the nation's automobile industry to massive, unpredictable, and unfair retroactive liability for decisions made based on an express federal standard that was intended to leave manufacturers "free to choose among ... options." U.S.Br.8.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,
Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
California Court of Appeal,
Fourth Appellate District, Division Three

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INTRODUCTION

In 1989, the National Highway Traffic Safety Administration (NHTSA) concluded that Type 2 (lap/shoulder) seatbelts were safer and more effective than Type 1 (lap-only) seatbelts and mandated installation of Type 2 seatbelts for the rear outboard seats of passenger vehicles. 54 Fed. Reg. 46,257, 46,257-58 (Nov. 2, 1989); 54 Fed. Reg. 25,275, 25,275-76 (June 15, 1989); 53 Fed. Reg. 47,982, 47,982-84 (Nov. 29, 1988). In proposing the new rule, the agency expressly found that Type 2 seatbelts would provide greater safety protection for children in booster seats and older children, and would have "no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts." 53 Fed. Reg. at 47,988-89. The agency also offered a clear explanation for choosing not to mandate Type 2 seatbelts for the *aisle* seats of passenger vans—a concern that the shoulder belt would obstruct the aisle if anchored to the side of the vehicle. 54 Fed Reg. at 46,258. At the same time, NHTSA "encourage[d]" manufacturers to "design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with the aisleway's purpose of allowing access to more rearward seating positions." *Id.*

Despite the agency's preference for Type 2 seatbelts and its statement encouraging their installation in aisle seats, respondents assert that petitioners' common-law claim that Mazda should have installed a Type 2 seatbelt in the aisle seat of a 1993 minivan is preempted because it conflicts with the agency's 1989 policy objectives. Unable to support this claim with either the contemporaneous regulatory history or the agency's own explanation of its objectives, respondents have compiled a scattershot collection of excerpts from NHTSA documents spanning four

decades in support of an argument that the agency wanted manufacturers to have the "freedom to choose" between Type 1 and Type 2 seatbelts for aisle seats. Respondents also assert that the agency's view that its own 1989 regulation was *not* intended to guarantee "freedom to choose" is entitled to no weight because NHTSA did not file briefs in other cases litigated by other parties in lower state and federal courts.

If adopted, respondents' approach would result in an extraordinary expansion of implied obstacle preemption. It would give courts license to displace state law by roving through decades of regulatory documents—including documents that postdate the regulation at issue by many years and reflect different agency concerns—to ascribe to the agency supposed policies distinct from those manifested in the applicable rule and its contemporaneous regulatory history. This Court has never endorsed such a free-wheeling and unprincipled theory of preemption. Nor has the Court ever hinted that a federal agency's position on the purpose and effect of its own regulations will be disregarded unless the agency has interceded in lower-court litigation on the issue. Respondents' sweeping theory of implied obstacle preemption and their casual invitation to cast aside the agency's view that the state-law claims at issue pose no obstacle to accomplishing its objectives should be rejected.

ARGUMENT

I. A FINDING OF NO PREEMPTION IS DICTATED BY BOTH *GEIER* AND *SPRIETSMA*.

A. Respondents and their amici attempt to portray this case as a carbon copy of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Specifically, respondents claim that the agency "intended to leave manufacturers free to

choose a Type 1 or Type 2 belt for the rear center/aisle seating position at issue, in order to serve largely the same federal objectives as the rule in *Geier*." Res.Br. 15-16. Respondents assert that they are not claiming a conflict simply because they complied with one option permitted by Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. § 571.208, but because the standard "embodies a policy judgment that manufacturers should be free to choose between Type 1 and Type 2 belts in rear center/aisle seats." *Id.* at 2-3.

Respondents' disclaimer narrows the issues in dispute. Petitioners have never contested that their common-law claims would be preempted under *Geier* if NHTSA's 1989 rule and its contemporaneous regulatory history clearly established a "deliberately imposed" policy that preserving the option to install Type 1 or Type 2 seatbelts in aisle seats was essential to achieving the agency's safety-related objectives. *Geier*, 529 U.S. at 881. However, the 1989 seatbelt rule was *not* designed to serve the same federal objectives as the rule in *Geier*, and respondents' "freedom-to-choose" theory is at odds with both the 1987-1989 regulatory history and the agency's own explanation of its objectives. *See infra* Parts II-IV. Thus, under the Court's approach in *Geier*, the Williamsons' state-law claim is not preempted. *See* Pet.Br. 26-50; U.S.Br. 8-31.

1. Respondents assert that petitioners are arguing "a legal theory straight out of the *dissent* in *Geier*" by relying on the "strong presumption" against preemption. Res.Br. 2, 21. But *Geier* did not reject the ordinary presumption against preemption; it rejected the notion that the Motor Vehicle Safety Act imposed a "'special burden' *beyond that inherent in ordinary pre-emption principles*–which 'special burden' would *specially disfavor* pre-emption here." *Geier*, 529 U.S. at 870 (emphasis added). In finding

"no *unusual*, *'special* burden' against pre-emption," *id.* at 873 (emphasis added), the *Geier* majority concluded that "ordinary pre-emption principles ... apply." *Id.* at 874. As the Court has since confirmed, ordinary preemption principles include a presumption against implied conflict preemption. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009). Indeed, only one year after *Geier*, the author of the majority opinion himself expressed the view that a "strong presumption *against* preemption" applies to claims of obstacle preemption. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 156-57 (2001) (Breyer, J., dissenting).

Furthermore, the *Geier* majority *agreed* with "the dissent's basic position that a court should not find preemption too readily in the absence of clear evidence of a conflict." *Geier*, 529 U.S. at 885. This "clear evidence" standard sets the bar for *overcoming* the ordinary presumption against preemption. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109-11 (1992) (Kennedy, J., concurring) (stating that obstacle preemption requires an "'irreconcilable conflict'" with federal objectives that are "conveyed with clarity" and criticizing "the plurality's broad view" as being contrary to the presumption against preemption).

2. Relying on *Geier*, respondents claim that it makes no difference that NHTSA "encourage[d]" manufacturers to install lap/shoulder belts at aisle seating positions. 54 Fed. Reg. at 46,258. According to respondents, NHTSA similarly "encouraged" airbags in 1984 by giving manufacturers a form of extra credit for airbag installation, yet *Geier* still found the airbag claim to be preempted. Res. Br. 42-43.

This argument misreads *Geier*. As *Geier* noted, the contemporaneous regulatory history of the 1984 rule on passive restraints explained that this "extra credit" was

necessary to "'encourage manufacturers to equip *at least* some of their cars with airbags'" because otherwise manufacturers would have elected to meet the passive restraint requirements "almost entirely (more than 99%) through the installation of more affordable automatic belt systems." *Geier*, 529 U.S. at 879-80 (citation omitted). Thus, *Geier* concluded, "[t]he credit provision *reinforces* the point that [the 1984 version of] FMVSS 208 sought a gradually developing mix of passive restraint devices ...." *Id.* at 880.

No similar rationale explains the agency's 1989 policy of encouraging Type 2 seatbelts in aisle seats. The regulatory history says nothing about ensuring a variety of different seatbelt types or phasing in Type 2 seatbelts over time. Because the agency *mandated* Type 2 seatbelts for rear *outboard* seats, encouraging manufacturers also to install the same type of seatbelt in *other* rear seats would obviously have defeated any goal of promoting diverse restraint types. Accordingly, this lawsuit is fully consistent with the agency's 1989 policy objectives as described in both the contemporaneous regulatory history and the government's brief. U.S.Br. 14-19 (explaining that 1989 rule did not seek to promote diverse seatbelt designs or preserve a role for Type 1 seatbelts).

B. Although the Court's approach in *Geier* supports petitioners here, the closest analogy is not to *Geier* but to *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). There, the Coast Guard's decision not to mandate propeller guards was based on feasibility concerns similar to those motivating NHTSA's decision not to mandate Type 2 seatbelts for aisle seats. *Id.* at 61-62, 66-68. The Coast Guard's "focus ... on the lack of any 'universally acceptable' propeller guard for 'all modes of boat operation,'" *id.* at 67, was comparable to NHTSA's recognition that there were unique technological issues pertaining to Type 2 seatbelts

in aisle seats. 54 Fed. Reg. at 46,258. And just as the Coast Guard's decision "left the law applicable to propeller guards exactly the same as it had been before," *Sprietsma*, 537 U.S. at 65, NHTSA's 1989 rule left the law applicable to aisle seating positions exactly the same as it had been before.[1]

Respondents argue that *Sprietsma* is inapposite because it involved an agency's decision "not to regulate *at all* in the pertinent area (propeller guards)." Res.Br. 38. In *Sprietsma*, however, the Coast Guard had already "promulgated a host of detailed regulations" on boat safety and performance, including "the use of specified equipment" and "precise standards governing the design and manufacture of boats themselves and of associated equipment, such as electrical and fuel systems, ventilation, and 'start-in-gear protection' devices." *Sprietsma*, 537 U.S. at 60. Thus, *Sprietsma* involved an agency's deliberate and carefully considered decision not to mandate *one particular type* of safety device, not a decision not to regulate *at all*. Here, NHTSA made a similar decision not to mandate one particular type of safety device for some rear seating positions. Indeed, adding a factor not present in *Sprietsma*, the agency stated a preference *in favor* of Type 2 seatbelts and *encouraged* their installation in aisle seats. 54 Fed. Reg. at 46,258.

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[1]For aisle and center seating positions, the 1989 amendments left unchanged a preexisting provision of FMVSS 208, which required that "each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2." 49 C.F.R. § 571.208 at S4.2.1(b) (1988 and as amended Nov. 2, 1989).

II. RESPONDENTS IMPROPERLY RELY ON FOUR DECADES OF AGENCY MATERIALS TO ASSERT POLICIES NOT REFLECTED IN THE RULE OR ITS CONTEMPORANEOUS REGULATORY HISTORY.

In the contemporaneous regulatory history, NHTSA explained why it had decided not to mandate Type 2 seatbelts for aisle and center seats. Its explanations made *no* reference to child safety, public acceptance of Type 2 seatbelts, diversity of seatbelt types, or freedom to choose. 54 Fed. Reg. at 46,258; 53 Fed. Reg. at 47,984-85.

Implicitly recognizing that their "freedom-to-choose" theory is not supported by the 1987-1989 regulatory history, respondents attempt to expand the universe of relevant agency materials by two decades on either side of the 1989 rule, with citations to NHTSA documents from as early as 1970, Res.Br. 6, to as recent as 2010. *Id.* at 30 n.11. Under *Geier*, however, the proper focus is on the agency policies reflected in the rule and its "contemporaneous" regulatory history. *See Geier*, 529 U.S. at 877, 886; *Wyeth*, 129 S. Ct. at 1203 (explaining that *Geier* "examin[ed] the rule itself and the DOT's contemporaneous record, which revealed the factors the agency had weighed and the balance it had struck"). Agency materials *predating* the 1987-1989 rulemaking are relevant only to the extent that the contemporaneous regulatory history establishes that they "influenced" the agency's decisions. *Id.* at 876. Agency materials *postdating* the 1989 rule are relevant only to the extent they explain the agency's policies *in 1989*. None of the materials cited by respondents fits these descriptions.

A. Agency Materials Predating the 1987-1989 Regulatory History

1. In *Geier*, this Court gave some consideration to the history of FMVSS 208 predating the 1984 amendment on passive restraints. Specifically, the Court considered the agency's prior experience with the highly unpopular "interlock ignition" device because "[t]hat experience influenced DOT's subsequent passive restraint initiatives." *Geier*, 529 U.S. at 876. As the Court noted, the *contemporaneous* 1984 regulatory history affirmatively demonstrated that the agency had rejected an "all airbag" standard because of concerns about a similar type of "public backlash" against airbags and a desire "to avoid another interlock-type fiasco." *Id.* at 878-89 (citing agency comments in 1984 regulatory history).

Respondents argue that the same sort of "public backlash" rationale applies to the 1989 rule on Type 2 seatbelts, citing agency comments from 1981-1984 regarding public acceptance *of passive restraints*—the same agency comments relied on in *Geier*. Res.Br. 12, 35, 45. This effort to piggyback on the concerns that drove the 1984 passive restraint rulemaking at issue in *Geier* is misdirected. Nothing in the 1987-1989 regulatory history on Type 2 seatbelts suggests that any such concern animated the 1989 seatbelt rule. On the contrary, the agency commented on the increased use and public acceptance of seatbelts after 1984, and it predicted that people who had become accustomed to wearing Type 2 seatbelts in front seats would be *more* likely to buckle up if Type 2 seatbelts were installed in rear seats. 54 Fed. Reg. at 46,257; 54 Fed. Reg. at 25,275-76; 53 Fed. Reg. at 47,982-84. Thus, respondents have it backwards when they suggest an agency concern "that mandating Type 2 seatbelts could *depress* overall seatbelt usage." Res.Br. 6.

Respondents also cite NHTSA statements from the 1970's regarding low public acceptance of seatbelts, complaints about comfort and fit, and problems of chest fit and pressure for women using Type 2 seatbelts. Res.Br. 6-7. By 1985, however, the agency had addressed these issues by imposing additional requirements to improve the fit and comfort of seatbelts. 50 Fed. Reg. 46,056 (Nov. 6, 1985) (final rule implementing changes to improve comfort of seatbelts, including new limit on contact pressure for upper torso seatbelt webbing). Moreover, the 1987-1989 Federal Register notices specifically commented on "Comfort and Convenience" without mentioning any continuing concern about Type 2 seatbelts. 54 Fed. Reg. at 46,264-25; 53 Fed. Reg. at 47,990-91. Indeed, the agency emphasized that the new "requirement for rear seat lap/shoulder belts will ensure ... comfort and convenience for ease of use." 53 Fed. Reg. at 47,984. Nothing in the contemporaneous regulatory history supports respondents' claim that any of these concerns from the 1970's influenced the agency's 1989 decision not to mandate Type 2 seatbelts for center or aisle seats.

2. Respondents further suggest that the child safety concern referred to by NHTSA when it denied a 1984 petition for Type 2 seatbelts was also a factor in its 1989 decision not to require Type 2 seatbelts for center and aisle seats. However, as NHTSA explained in 1988, its 1984 assessment regarding child safety was based on its earlier preference for a "then-popular type of child restraint" with a tether anchorage that was no longer in production by the time of the 1987-1989 rulemaking. 53 Fed. Reg. at 47,982-83 (noting that "child restraint production had shifted away from those that were designed to have a tether anchored to the vehicle"). Although respondents claim that "tethered child seats remained common," Res.Br. 9, they cite nothing

to support this assertion, and it is at odds with what NHTSA said in the regulatory history. *See also* 53 Fed. Reg. 24,394, 24,395 (June 28, 1988) ("Child seating systems equipped with top tether straps virtually have disappeared"); 50 Fed. Reg. 27,633, 27,634-35 (July 5, 1985) (citing 1984 study finding widespread misuse of tethered child restraints and stating that "the proportion of new child restraints equipped with tether straps has declined dramatically"). In short, the child safety concerns that caused the agency to deny the 1984 petition had *no* influence on its 1989 decision not to mandate Type 2 seatbelts for aisle seats.[2]

3. Respondents mistakenly rely on documents from 1970 and 1984 as evidence that "child seats of that era were generally more compatible with Type 1 belts." Res.Br. 6. NHTSA specifically addressed child-seat compatibility during the 1987-1989 rulemaking. The Notice of Proposed Rulemaking (NPRM) initially stated that "the agency has *heard reports* that *some current combinations* of child restraints and rear safety belt systems may be incompatible" and it solicited "comments on the current magnitude of the incompatibility problem." 53 Fed. Reg. at 47,988 (emphasis added). However, the only comments on compatibility that the agency discussed in the final rule were those relating to emergency locking retractors (ELRs). 54 Fed. Reg. at 46,261-62. And respondents

[2] Respondents claim that the type of tether anchorage referred to in the 1984 denial was "akin to what later would become known as the 'LATCH' system." Res.Br. 8-9. They cite nothing to support their claim that these are similar types of child restraints. In any event, NHTSA did not mandate the LATCH system until 1999, a decade *after* it issued the 1989 rule and six years *after* the Williamsons' minivan was manufactured. 64 Fed. Reg. 10,786 (Mar. 5, 1999).

concede that the controversy involving ELRs does not support them here. Res.Br. 10 n.5. Furthermore, the agency expressed confidence in 1989 that the lockability requirement would provide additional assurance that child seats would be safely secured using *either* a "lap belt *or* lap belt portion of a lap/shoulder belt." 54 Fed. Reg. at 46,262 (emphasis added). Simply put, the agency did not believe that there was any compatibility issue.

4. Respondents also rely on NHTSA's longstanding position that rear-center seats are safest for young children, and the fact that FMVSS 213, 49 C.F.R. § 571.213, which addresses child restraint systems, did not permit testing of child seats using shoulder belts until 1994. Res.Br. 10, 30. However, neither of these factors reflects an agency policy against Type 2 seatbelts in center or aisle seats. As respondents acknowledge, the rear-center seat is generally considered the safest for children because of "its distance from potential points of impact" in a side impact collision, not for reasons relevant to the issues here. Res.Br. 30 (citation omitted). Moreover, the former lap belt testing rule of FMVSS 213 was based on two factors having nothing to do with a supposed federal policy against the use of Type 2 seatbelts with child seats. First, for "cost" reasons, "the seat assembly used to test child restraints was developed to represent the typical vehicle bench seat," which "at the time of the development of Standard 213's dynamic test typically had only a lap belt, and not a lap/shoulder belt system." 58 Fed. Reg. 46,928, 46,929 (Sept. 3, 1993). The key point was thus to establish test conditions that utilized the type of belt most commonly used at that time (Type 1), not to preclude installation of a belt that provided greater protection (Type 2). This point is confirmed by NHTSA's second rationale: testing child restraints with lap belts "ensured that the restraint will

provide adequate safety even if a supplemental restraint (e.g., a top tether or the shoulder portion of the lap/shoulder combination) is not used." *Id.* FMVSS 213 thus offers respondents no support here.

5. Respondents cite a 1980 statement by NHTSA expressing concern that children between 5 and 12 years old "may be too short to use shoulder belts designed for adults." Res.Br. 30 (citing 45 Fed. Reg. 81,625, 81,627 (Dec. 11, 1980)). However, NHTSA went on to note that "unique restraints for these older children are available and include booster seats and shoulder harnesses." 45 Fed. Reg. at 81,627. In the 1987-1989 rulemaking, NHTSA made clear that to prevent the shoulder belt from passing over the face or neck of a child in this age group, parents should either use a booster seat or place the shoulder portion of the belt behind the child. 53 Fed. Reg. at 47,988.[3] Thus, NHTSA concluded that Type 2 seatbelts "would offer benefits for children riding in some types of booster seats, would have *no positive or negative effects* on children riding in most designs of car seats *and children that are too small to use shoulder belts*, and would offer older children the same incremental safety protection that would be afforded adult rear seat occupants." *Id.* at 47,988-89 (emphasis added). Contrary to respondents' claim, the agency did *not* make any finding that "Type 2 belts were

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[3]Respondents wrongly suggest that "the first booster seats compatible with shoulder belts" were not manufactured until 1994. Res.Br. 13. In the 1988 NPRM, the agency specifically stated: "Booster seats are *often designed* to use vehicle shoulder belts to provide additional upper torso restraint." 53 Fed. Reg. at 47,988 (emphasis added). As early as 1986, NHTSA noted that some booster seats were "designed to use the shoulder belt in a vehicle so that it will provide the necessary upper torso restraint." 51 Fed. Reg. 5,335, 5,338 (Feb. 13, 1986).

unsafe for this key group" or that "Type 1 belts worked better with most child restraint systems." Res.Br. 30, 50.[4]

B. Agency Materials Postdating the 1987-1989 Regulatory History

1. Respondents also rely on a host of regulatory events and sources that postdate both the 1989 version of FMVSS 208 and the 1993 manufacture of the minivan at issue here. These include: (1) a 1994 NHTSA survey of child seat usage (Res.Br. 9, 31); (2) a 1994 letter from NHTSA's Chief Counsel responding to a letter from a private citizen (Res.Br. 1-2, 16-17, 28, 33-34, 34 n.12, 42, 51); (3) a 1996 NHTSA publication on misuse of child safety seats (Res.Br. 13); (4) a 1999 rule on seatbelt anchorages (Res.Br. 9 n.3, 13); (5) a 2004 rule allowing the use of detachable, non-integrated shoulder belts (Res.Br. 11); and (6) a current NHTSA warning not to place a shoulder belt behind a child's back (Res.Br. 30 n.11).

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[4]Respondents' heavy reliance on the 1987 Advance Notice of Proposed Rulemaking (ANPRM) is similarly misplaced. In the ANPRM, the agency expressed its preliminary *opposition* to *any* rule mandating Type 2 seatbelts for rear seats. The agency tentatively concluded that the costs would be "extremely disproportionate to the possible safety benefits." 52 Fed. Reg. 22,818, 22,819 20 (June 16, 1987) ("NHTSA believes it will be difficult to demonstrate that requiring installation of lap/shoulder belts would be cost effective"). In the NPRM, however, the agency repudiated this view and concluded that the costs and benefits had "changed substantially since the ANPRM was issued." 53 Fed. Reg. at 47,983. Because the ANPRM opposed mandating Type 2 seatbelts for *any* rear seats, it sheds no light on the reasons for the agency's subsequent decision to mandate Type 2 seatbelts for rear outboard seats, but not for aisle or center seats.

Respondents do not explain how any of this material is relevant to the preemptive effect of a 1989 regulation. The question presented is whether petitioners' tort claim poses an obstacle to the objectives of the 1989 version of FMVSS 208. None of the post-1989 materials cited by respondents purported to explain or interpret the objectives of the 1989 regulation, and most were based on new facts not available to the agency in 1989. Some also reflected shifting agency policies different from those animating the 1987-1989 rulemaking. For example, NHTSA's current policy discouraging placement of the shoulder belt behind a child obviously differs from its earlier policy that "[i]f a booster seat is not used, the shoulder belt should be routed behind the child, and the child should be protected only by the lap belt." 53 Fed. Reg. at 47,988.

The fact that NHTSA may have reevaluated or modified some of its substantive policies over the past two decades does not retroactively imbue the 1989 amendments to FMVSS 208 with preemptive force. Either providing a choice of options was integral to the accomplishment of the agency's objectives or it was not. The Court must make that determination based on the agency policies reflected in the 1989 version of FMVSS 208 and the "contemporaneous" regulatory history. *Geier*, 529 U.S. at 877, 886. As respondents argued below, *subsequent* agency policies have "'no bearing'" on the preemption issue. *See* Res.Br. in Cal. Ct. App. at 37 n.15 (quoting *Carden v. Gen. Motors Corp.*, 509 F.3d 227, 231 n.1 (5th Cir. 2007)).

Many of respondents' citations to subsequent history are actually directed to criticizing the wisdom of the substantive judgments made by NHTSA in 1989. For example, respondents criticize the agency's 1989 judgment that older children could safely place the shoulder belt

behind their backs, Res.Br. 9, that child restraint production had shifted away from tethers, *id.* at 8-9, that many existing designs of booster seats were compatible with Type 2 seatbelts, *id.* at 13, and that there were no compatibility issues involving other types of child seats. *Id.* at 31. Whatever their merits, these criticisms do not advance respondents' preemption argument. The issue is whether there is a conflict between NHTSA's 1989 objectives and petitioners' common law claims, not whether NHTSA's judgments were sound.[5]

2. Respondents rely heavily on a 1994 letter written by NHTSA's Chief Counsel. *See infra* Addendum. This letter did not discuss preemption and was an informal response to a private citizen's inquiry. Moreover, respondents ignore most of what the letter said. First, the Chief Counsel succinctly explained NHTSA's 1989 decision regarding aisle seats: "NHTSA decided not to require shoulder safety belts at these seating positions because the agency recognized that the belts might obstruct an aisle designed to give access to rear seating positions. Manufacturers are, however, permitted to provide lap/shoulder belts if they choose to do so." *Id.* at 2. Notably, the letter mentioned nothing about child safety, public acceptance, gradual phase-in of Type 2 seatbelts, or diversity of restraint types.

Second, the letter stated that "shoulder safety belts which cross an aisle ... do not in fact prevent rearward

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[5]Respondents also rely on a 2004 statement by NHTSA that the exclusion for aisle seats was partly due to a concern that "attaching belt anchorages to the side of the vehicle could cause a lap/shoulder belt to fit its user poorly." 69 Fed. Reg. 70,904, 70,905 (Dec. 8, 2004). However, nothing in the contemporaneous regulatory history suggests that this concern was a factor in the 1989 rulemaking.

passengers from exiting the vehicle" and explained that "any difficulty that rearward occupants face in exiting the vehicle is much smaller than that faced by rear seat occupants in a two-door car or the occupants of middle seats." *Id.* The letter went on to emphasize: "In considering the safety of such belts, it is also important to consider the extra protection offered by the shoulder belt to the occupant who wears it." *Id.* Thus, to the extent the letter is probative of agency policy, it suggests that the agency believed the benefits of installing shoulder belts in aisle seats outweighed the risks—even if the shoulder belt extended across the aisle.

Finally, respondents' reliance on the last sentence of the letter is mistaken. In that sentence, the Chief Counsel stated: "We believe the vehicle manufacturer is in the best position to balance, for its vehicles, the benefits associated with this extra protection against any difficulties related to occupants entering and exiting the vehicle." *Id.* Contrary to respondents' assumption, the fact that a vehicle manufacturer might be in better position to weigh the pros and cons of a safety device does not suggest that NHTSA believed that common-law claims were preempted. State common law requires that manufacturers act reasonably in response to what they know or should know. In the infamous Ford Pinto case, for example, the evidence established that Ford had conducted crash tests, knew about the defective fuel tanks, and could have fixed them at nominal cost, but decided to proceed anyway. *See, e.g., Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 360-62 (Cal. Ct. App. 1981). Ford was in the best position to assess the costs and benefits, and it acted unreasonably given its knowledge of the risk.

"[T]he Motor Vehicle Safety Act was necessary because the industry was not sufficiently responsive to safety con-

cerns." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983). By defining the federal safety standards as "minimum" standards, 49 U.S.C. § 30102(a)(9), and stating that compliance "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), Congress deliberately preserved state common law as an incentive for manufacturers to develop safer vehicles and as a means of compensating injured victims. Giving vehicle manufacturers a free pass to act unreasonably would defeat the purpose of the law.

3. Ironically, despite their own reliance on random snippets of regulatory history spanning multiple decades, respondents accuse petitioners of advocating a theory of preemption that "flits in and out" over time based on technological developments. Res.Br. 16. This argument confuses the theory of liability on the merits of the state-law claims with the question whether those claims are preempted. Petitioners' theory of *liability* is that respondents had a duty to equip the aisle seat in their vehicle with a Type 2 belt because, at the time the vehicle was manufactured, it was technologically feasible to do so without obstructing the aisle, and a reasonable manufacturer would have done so. Pet.Br. 18; *see also* Res.Br. 36-37 n.13 (acknowledging that feasibility of safer design is one factor for determining *liability* under California common law). However, petitioners have never suggested that their *preemption* argument depends on the feasibility of a safer design. Because this type of seatbelt claim does not conflict with any agency policies embodied in the 1989 version of FMVSS 208, the 1989 rule would not preempt such a claim for *any* vehicle, regardless of when it was manufactured. Although a plaintiff might have difficulty establishing *liability* without proving the feasibility of a safer design, preemption and liability are distinct issues.

III. RESPONDENTS RELY ON IRRELEVANT FACTORS RELATING SOLELY TO REAR-CENTER SEATS.

At the petition stage, respondents acknowledged that "this case involves the use of a Type 1 seatbelt in an aisle seat rather than a true center seat" and observed that NHTSA had identified "unique" reasons for its decision regarding aisle seats. Res.Supp.Br. 7 (citation omitted). Respondents emphasized that what was controlling was "the FMVSS 208 administrative record as it relates to type-2 seatbelts in *rear aisle seats*." *Id.* at 9 (emphasis added). In the merits briefing, however, respondents retreat dramatically from this position by drawing heavily on NHTSA's rationale for not mandating Type 2 seatbelts in rear-*center* seats, such as the agency's discussion of technological issues unique to rear-center seats (potential interference with cargo area and driver's rearward vision), *id.* at 34, and the agency's cost-benefit analysis for rear-center seats. *Id.* at 35-36.

These factors have no bearing on the aisle-seat issue here. In particular, the agency's cost-benefit analysis for rear *center* seats was heavily influenced by their low occupancy rate and the correspondingly lower safety benefits that would accrue from mandating Type 2 seatbelts for those seats. 54 Fed. Reg. at 46,258 (commenting on "small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task"); 53 Fed. Reg. at 47,984 (referring to NHTSA-sponsored survey finding "that the rear center seating position is the least-used seating position in cars"). The second-row aisle seat of a minivan does not have a similarly low occupancy rate—the agency specifically recognized that "these vehicles will have a greater-than-average occupancy rate in the rear seats,

with accompanying greater-than-average benefits." *Id.* at 47,985-86. Accordingly, the agency's cost-benefit analysis for rear-*center* seating positions is irrelevant to the aisle seating position at issue here.[6]

IV. THE COURT SHOULD GIVE WEIGHT TO THE AGENCY'S VIEW THAT PETITIONERS' COMMON-LAW CLAIMS DO NOT POSE ANY OBSTACLE TO ITS OWN POLICY OBJECTIVES.

This Court has repeatedly emphasized that federal agencies have a thorough understanding of their own regulatory objectives. For this reason, when deciding issues of implied obstacle preemption, the Court has given weight to a federal agency's view that state law would *not* interfere with its own objectives. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 549 (2008); *Sprietsma*, 537 U.S. at 67-68; *Geier*, 529 U.S. at 883.

Contrary to these precedents, respondents argue that the Court should give *no weight* to NHTSA's view that petitioners' common-law claims would not pose an obstacle to its 1989 policy objectives. According to respondents, the government's position is "inherently suspect" because the agency "sat idle for nearly a decade as one court after

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[6] With respect to aisle seats of passenger vans, NHTSA cited GM's comment that structural modifications necessary to anchor the shoulder belt to the roof "would impose disproportionately high costs." 54 Fed. Reg. at 46,258. However, NHTSA obviously believed that any feasibility and cost issues could be overcome over time; otherwise, it would not have encouraged manufacturers to design and install Type 2 seatbelts in aisle seats. *Id.* NHTSA did not conduct a cost-benefit analysis specific to aisle seats, other than to comment that rear seat lap/shoulder belts in passenger vans "would offer greater safety benefits than [in] any other vehicle type except passenger cars." 53 Fed. Reg. at 47,986.

another held that FMVSS 208 preempted state tort actions based on failure to install a Type 2 belt." Res.Br. 49.[7]

This argument is not supported by any authority. Respondents do not dispute that the agency's current position is fully consistent with the views it has expressed on the preemptive effect of its own "options" standards in amicus briefs filed with this Court over the past 20 years. Pet.Br. 30-32; U.S.Br. 29-31. This case is thus nothing like *Wyeth*, where the agency expressed one view on preemption in its 2000 notice of proposed rulemaking, but then announced "a dramatic change in position" by taking the opposite view in a 2006 preamble to the final rule. *Wyeth*, 129 S. Ct. at 1202-03.

Respondents' argument amounts to a claim that federal agencies have an affirmative duty to monitor all pending litigation in the lower state and federal courts and to make their views known whenever a litigant or court takes a position contrary to their own. That is quite a stretch.

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[7] Respondents and their amici exaggerate the weight of the lower court cases on this issue. Aside from this case, there are only three reported seatbelt cases involving the 1989 amendments to FMVSS 208. *Carden*, 509 F.3d 227; *Roland v. General Motors Corp.*, 881 N.E.2d 722 (Ind. Ct. App. 2008); *Heinrichs v. VolvoCar Corp.*, 809 N.E.2d 1094 (Mass. App. Ct. 2004). The two earlier cases included in respondents' "decade" of lower court precedents did *not* involve the 1989 version of FMVSS 208. One involved a front seating position not subject to the 1989 rule. *Griffin v. General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), and another involved the front driver's seat of a Greyhound bus not subject to the 1989 rule because it had a gross vehicle weight of 28,200 pounds. *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381 (7th Cir. 2000); see 54 Fed. Reg. at 46,267 (1989 rule limited to small buses with gross vehicle weight of 10,000 pounds or less). Neither of these two cases even mentions the 1989 rule or its regulatory history.

Federal agencies cannot be expected to intercede in every case involving the interpretation or effect of their regulations. Most fundamentally, there is "no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than 'the agency's fair and considered judgment on the matter.'" *Geier*, 529 U.S. at 884 (citation omitted). It would be extraordinary for this Court to disregard the agency's view that petitioners' lawsuit does *not* frustrate the agency's ability to accomplish its own objectives.

CONCLUSION

The decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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October 2010

DEC 28 1994

Mr. Roger Matoba
5665 White Mountain Ct.
Martinez, CA 94553

Dear Mr. Matoba:

This responds to your letter, addressed to Patricia Breslin, asking us to review our safety belt requirements for rear outboard seating positions in passenger vans. You stated that manufacturers interpret Safety Standard No. 208 to require the installation of shoulder belts for these seating positions. You expressed concern that this requirement creates a safety hazard for vehicles with a side aisle to rear seating locations. According to your letter, passenger seats next to the side aisle have shoulder belts that cross the aisle. You believe that these shoulder belts would block the exit of more rearward passengers in an emergency, and suggested that we eliminate this requirement.

Your understanding of Standard No. 208's requirements is not entirely correct. It is correct that the standard requires (S4.2.4) lap/shoulder safety belts in all forward-facing "rear outboard designated seating positions" in new passenger vans with a GVWR of 10,000 pounds or less. However, under S4.2.4.1, the term "rear outboard designated seating position" excludes, for purposes of this requirement, any seating positions that are "adjacent to a walkway located between the seat and the side of the vehicle, which walkway is designed to allow access to more rearward

seating positions." Therefore, the seating positions that you are concerned about are not required to have shoulder safety belts. The standard instead only requires manufacturers to provide lap safety belts for these seating positions.

NHTSA decided not to require shoulder safety belts at these seating positions because the agency recognized that the belts might obstruct an aisle designed to give access to rear seating positions. Manufacturers are, however, permitted to provide lap/shoulder belts if they choose to do so.

With respect to your concerns about the safety of shoulder safety belts which cross an aisle, I note that such belts do not in fact prevent rearward passengers from exiting the vehicle. Such passengers may exit the vehicle by going under or over the belt. They may also move the belt aside by spooling out the webbing, or even unlatch the belt. Indeed, any difficulty that rearward occupants face in exiting the vehicle is much smaller than that faced by rear-seat occupants in a two-door car or the occupants of middle seats. In considering the safety of such belts, it is also important to consider the extra protection offered by the shoulder belt to the occupant who wears it. We believe the vehicle manufacturer is in the best position to balance, for its vehicles, the benefits associated with this extra protection against any difficulties related to occupants entering and exiting the vehicle.

I hope this information is helpful. If you have any further questions, please contact Edward Glancy of my staff at (202) 366-2992.

Sincerely,

/s/ John Womack
for Philip R. Recht
Chief Counsel

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Concurrence: NRM/NEF
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MAY 4 - 2010

No. 08-1314

In the Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to this Court's Rule 15.8, respondents submit this brief in response to the *amicus curiae* brief of the United States. The government's brief is peculiar in several respects. Although conceding that the lower courts are in complete agreement on the issue presented here, the government urges the Court to review this case because it would like the Court to reject an argument that the court below did *not* adopt and that respondents have *never* urged. And it proposes that the Court use this case to resolve a disagreement between *other* lower courts over issues that are *not* presented here – disagreements that, on examination, prove largely chimerical. The government's strained presentation confirms that this case does not warrant the Court's attention.

A. The Lower Court Decisions Interpreting FMVSS 208 Are In Agreement And Are Consistent With *Geier*.

1. The government acknowledges that there is no conflict in the lower courts on the issue actually presented in this case: whether FMVSS 208 preempts a state tort claim that a vehicle manufactured in 1993 was defectively designed because it lacked a type 2 seatbelt in one rear seating position. U.S. Br. 8, 17. On that, the government plainly is correct. Each of the six appellate decisions to address this question – indeed, each of the 18 federal or state judges to consider the question on appeal – has found preemption warranted.[1] That concession is reason enough to deny the petition.

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[1] In those six decisions, en banc rehearing was sought in the three federal cases and state high court review in the three

2. In nevertheless urging review of the decision below, the government insists that each of these decisions held state law preempted by federal rules "that set only minimum standards" (U.S. Br. 8), that these asserted holdings "over-read" *Geier* (*id.* at 17-18), and that this "over-reading" departs from the government's longstanding view "that a minimum safety standard provided in a FMVSS, without more, does not conflict with a stricter state requirement." *Id.* at 15. But this argument is flawed for a basic reason: these decisions did *not* hold that minimum federal standards, without more, preempt stricter state rules. Instead, each court in these cases closely examined the purpose and regulatory history of FMVSS 208 and concluded that state liability would frustrate particular, deliberately adopted federal policies. None of these decisions adopted the "minimum standard" approach to preemption criticized by the government; respondents did not below, and do not now, advocate it. See Resp. Br. 2-3, *Williamson v. Mazda Motor Corp.*, No. G038845 (Cal. Ct. App. Apr. 1, 2008) (describing "NHTSA's policy reasons," "includ[ing] compatibility with child safety seats," why "FMVSS 208 is a comprehensive regulatory scheme, and not a minimum safety standard"). Thus, the issue the government urges the Court to decide – whether "NHTSA's decision to allow [manufacturers a choice of] options, standing alone, * * * compel[s] a *finding* of preemption" (U.S. Br. 18) – is simply not presented here.

In contending otherwise, the government contents itself with brief parenthetical snippets from those decisions. U.S. Br. 18. But a review of the rea-

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state cases; no judge on any court expressed disagreement with the panel or suggested that further review was warranted.

soning actually used by those courts paints a very different picture.

The first post-*Geier* decision to address FMVSS 208's application to seatbelts involved the rule that manufacturers of heavy buses need provide only a type-1 seatbelt for the driver. In that case, Judge Wood wrote for a unanimous Seventh Circuit that "NHTSA's decision to leave the manufacturers of heavy buses with the option of using a two point seat belt * * * is quite understandable as a way of promoting safety by encouraging drivers to use the safety equipment that manufacturers install", liability for failure to install a three-point belt "could reduce [seatbelt] utilization and thereby undermine FMVSS 208's safety objective." *Hurley*, 222 F.3d at 382. For this reason, the court found that, "as in *Geier*, the decision to leave options open to bus manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective and is therefore preempted." *Ibid.*

The subsequent decisions cited by the government likewise examined, specifically and in detail, the policy and administrative background of FMVSS 208. In *Roland*, for example, the court found it

> clear that NHTSA's regulation of seat belt use was motivated by the same policy concerns that the Supreme Court identified in *Geier* as the basis for the agency's decision to permit various passive restraint options: safety and consumer acceptance (with respect to child restraints), technical difficulties (including issues as to anchor locations and possible interference with the rear view mirror), and lowering costs to encourage technological developments.

881 N.E.2d at 727.

The court pointed specifically to regulatory history suggesting that "requiring Type 2 belts is not the best approach for providing maximum safety protection for children," that requiring use of such belts "in all rear seat locations could result in lost opportunity to improve vehicle safety through other means," and that requiring use of such belts might "impede driver's rearward vision." 881 N.E.2d at 727 n.4. See *id.* at 728 ("FMVSS 208's extensive rule making history 'indicates that child safety concerns * * * played a part in the decision not to require lap/shoulder belts in rear seating positions.'"). The court therefore held that a state-law tort action challenging a manufacturer's failure to include type-2 belts in a rear center seat "is pre-empted on the *narrow* grounds that it conflicts with the deliberate and comprehensive regulatory scheme set forth in FMVSS 208." *Id.* at 729. In reaching this conclusion, the court emphasized that it did *not* "find[] pre-emption based on the broader grounds that any regulation which affords a choice to a manufacturer pre-empts the state action." *Ibid.*

The remaining FMVSS 208 decisions, although offering varying amounts of detail on the regulatory history, likewise found that "the agency identified specific policy reasons for its decision" not to require type-2 seatbelts – including "child safety concerns" – and that this decision was part of a "comprehensive regulatory scheme" that would be frustrated by differing state rules. *Carden*, 509 F.3d at 531 & n.2, 532. See *Griffith*, 303 F.3d at 1281-82 (in a case involving a pickup truck, court relied on *Hurley*'s holding that state liability for failure to install type-2 seatbelts "'could reduce utilization and thereby un-

dermine FMVSS 208's safety objectives"); *Heinricher*, 809 N.E.2d at 1098 & n.6 (noting that "[o]ne of the reasons that the DOT decided to implement a rear seat lap-shoulder harness *option*, rather than a *requirement*, was its desire not to hinder the development of other safety advancements," and that state liability for failure to install a type-2 belt therefore "would conflict with and stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in Standard 208").

The holding below in this case relied on each of these decisions, and their analysis of the rulemaking record, to find that state liability would frustrate regulatory goals. The court began by applying "the traditional presumption against preemption." Pet. App. 8. But even against that background, the court found it "'clear that the agency's decision was deliberate and based on managing technological constraints and cost efficiency'" (*id.* at 17 (quoting *Carden*, 509 F.3d at 231-32)); the court pointed to *Roland*'s conclusion that the rule at issue here "'was motivated by the same policy concerns . . . identified in *Geier*,'" including "'safety and consumer acceptance (with respect to child restraints), technical difficulties (including issues as to anchor locations and possible interference with the rear view mirror), and lowering costs to encourage technological developments.'" *Id.* at 18 (quoting *Roland*, 881 N.E.2d at 727; ellipses added by the court). The court therefore held that state liability would "'stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208.'" *Id.* at 23 (quoting *Heinricher*, 809 N.E.2d at 1098. On the face of it, this is not the "preemption by minimum standard rule" that the government would like to challenge.

3. The question *actually* presented in this case is narrow: whether the court below correctly concluded that imposing state liability for failure to install a type-2 seatbelt in the aisle seat of a minivan would conflict with the agency's objectives in promulgating FMVSS 208. For several reasons, that question does *not* warrant review.

First, this issue is of limited and diminishing importance. Because there is no dispute about the controlling principle – all agree that preemption is required if state liability *would* interfere with regulatory policy (*see, e.g., Geier*, 529 U.S. at 875-76, 881-82) – resolution of this issue would turn on determining the agency's intent in promulgating the 1989 amendments to FMVSS 208 more than 20 years ago. And the answer even to that narrow question would have limited prospective importance because, as the government acknowledges (U.S. Br. 4 n.1), the standard at issue here has not applied to cars manufactured since September 1, 2007, all of which must have type-2 seatbelts at all forward-facing rear seating positions. Deciding the specifics of what the agency intended two decades ago regarding vehicles that are no longer manufactured, under a standard that has since been superseded, when the lower courts are in complete agreement on the question, would not be a productive use of this Court's resources.[2]

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[2] The government notes that "this Court granted review in *Geier* although by that time the question presented no longer affected new cars." U.S. Br. 19. As the Court explained, however, the lower courts were widely divided on the question whether the rule at issue in *Geier* was preemptive, with five federal courts of appeals (applying two different theories) holding that it was and five state courts of last resort holding that it was

Second, even if the question of the agency's intent in 1989 regarding use of type-2 seatbelts in rear seats were thought to warrant review, this case would not be a suitable one in which to resolve it. Although the government's presentation of the point is oblique, it recognizes that "this case involves the use of a Type 1 seatbelt in an aisle seat [of a minivan] rather than a true center seat." U.S. Br. 19 n.3. That consideration makes this case atypical, in ways that would be material to the preemption analysis. The agency identified unique safety justifications for not equipping aisle seats with type-2 belts, such as the need for passengers in the back row of a minivan to be able to exit the vehicle in an emergency without interference from a shoulder belt in or near the aisle. See 54 Fed. Reg. 46,257, 46,258 (Nov. 2, 1989); 69 Fed. Reg. 70,904, 70,909 (Dec. 8, 2004). Decision of this case therefore could leave unresolved the preemption rule that applies to most of the vehicles still on the road that are subject to the 1989 amendments to FMVSS 208, which are sedans with rear center seats.

Third, the decision below is correct. There is ample support for the court's conclusion that the agency believed that allowing manufacturers to use *either* type-1 or type-2 seatbelts for inboard rear seats was necessary to overcome "technical difficulties," avoid "substantially greater costs," and promote "safety and consumer acceptance (with respect to child re-

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not. This Court "granted certiorari to resolve these differences." *Geier*, 529 U.S. at 866. Moreover, *Geier* presented unresolved and broadly applicable questions about the meaning of the preemption and savings clauses of the National Traffic and Motor Vehicle Safety Act of 1966. *Id.* at 867-874. Neither consideration is present here.

straints)"; indeed, the agency repeatedly expressed concern about the wide misuse and non-use of type-2 seatbelts with child safety seats and booster seats during the relevant period. Pet. App. 17-19. See, *e.g.*, 53 Fed. Reg. 47,982, 47,984-47,985 (Nov. 29, 1988) ("technical difficulties," "small safety benefits," and "substantially greater costs" for inboard rear seats); 54 Fed. Reg. 46,257, 46,258 (Nov. 2, 1989) (same); *ibid.* (type-2 belts would "cause entry and exit problems for occupants of seating positions to the rear of the aisleway seating position"); 69 Fed. Reg. 70,904, 70,909 (Dec. 8, 2004) (same); 54 Fed. Reg. 46,257, 46,262 (Nov. 2, 1989) (type-2 belts could discourage use of child safety seats). Given the universal agreement in the lower courts on these points, which confirms the correctness of the holding below, review of the question by this Court is unnecessary.[3]

B. There Is No Conflict In The Lower Courts On The Meaning Of *Geier*.

The government also urges the Court to grant review because a handful of lower courts disagree on whether *other* federal safety rules that are *not* at issue here have a preemptive effect, a disagreement that the government says reflects confusion "on how to apply the reasoning of *Geier* to claims of FMVSS preemption generally." U.S. Br. 17. Of course, even if

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[3] The government urges deference to its view. U.S. Br. 15-17. But that "[t]he government has consistently maintained that a minimum safety standard provided in a FMVSS 208, without more, does not conflict with a stricter state requirement" (*id.* at 15), is beside the point: the court below did not apply, and we do not urge, such a rule. The government has not previously expressed a view on FMVSS 208's preemptive effect in any rear seatbelt case, let alone in the rear aisle seat context presented here.

there were such a conflict, it would not be sensible to attempt to resolve it in this case, where it is not presented and did not affect the outcome below, and where the only disagreement between the parties is over how the controlling principle applies to the FMVSS 208 administrative record as it relates to type 2 seatbelts in rear aisle seats. But there is, in fact, no such fundamental confusion in the lower courts on "how to apply *Geier*'s reasoning to FMVSS provisions that do not affirmatively seek to foster a diversity of options." *Id.* at 20. The decisions cited by the government establish no such confusion; they simply reveal disagreement about the intent underlying particular regulatory provisions. The courts in these cases used the approach advocated by the government here (U.S. Br. 9-17), determining the preemptive effect of the applicable provision of the FMVSS by examining its regulatory history and stated policies.

Thus the Fifth Circuit, in *O'Hara* v. *General Motors Corp.*, 508 F.3d 753 (2007), after a lengthy review of the regulatory history of FMVSS 205, concluded that this regulation did not preempt a claim that a vehicle was defective because it used tempered, rather than laminated, glass in side windows; distinguishing *Hurley*, where there was evidence "that the plaintiffs' safety enhancements would actually frustrate NHTSA's safety goals" (*id.* at 761), the Fifth Circuit found that FMVSS 205 was, in contrast to FMVSS 208, simply "a minimum safety standard." *Ibid.*[4] Accord *MCI Sales & Serv., Inc.* v.

[4] The government is wrong in hinting (U.S. Br. 20 n.4) that the Fifth Circuit's decision in *O'Hara* is inconsistent with its subsequent ruling in *Carden*. As noted in text, *O'Hara* relied on the Seventh Circuit's decision in *Hurley*, as did *Carden* (see 509

Hinton, 272 S.W.3d 17, 29 (Tex. Ct. App. – Waco 2008) (same, relying on *O'Hara*), review granted, No. 09-0048 (Tex. argued Mar. 24, 2010). Other courts have reached the contrary conclusion – *not* because they rejected the Fifth Circuit's analytical approach, but because they could not "agree with the *O'Hara* court's conclusion that FMVSS 205 is only a minimum standard and that there is no federal policy which would be frustrated." *Lake* v. *Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 WL 891867, at *7 (Tenn. Ct. App. Mar. 15, 2010). See *id.* at *8 ("It appears that the NHTSA left the options for glass open so that manufacturers could choose the safety features that best accomplished both purposes [of decreasing risk of ejection from the vehicle and injury from impact with glass]."); *Morgan* v. *Ford Motor Co.*, 680 S.E.2d 77, 94 (W. Va. 2009) (preemption because "NHTSA has indicated that glazing other than tempered glass can increase the risk of neck injuries in accidents"). That disagreement may or not some day warrant this Court's attention, but that day surely should await arrival of a case that actually presents the question.[6]

F.3d at 231). The petition for rehearing en banc in *Carden* argued as its principal point that *Carden* departed from *O'Hara*. See Appellants' Pet. for *En Banc* Reh'g at 5-11, *Carden* v. *General Motors Corp.*, No. 06-11182 (5th Cir. Dec. 17, 2007). The Fifth Circuit denied the petition, with no judge calling for a poll.

[6] The disagreement as to bus seatbelts identified by the government (U.S. Br. 20-21) similarly focused on the particulars of the regulatory intent. Compare *MCI Sales*, 272 S.W.3d at 26 (no preemption because "there is no federal regulation that addresses passenger seatbelts in motor coach buses") with *Lake*, 2010 WL 891867, at *10, 11 ("there was a federal policy not to require seatbelts" and state liability "would absolutely conflict

In this context, it is the government that "overreads" the cases when it proposes that these decisions "have noted the need for further guidance from this Court" and have "acknowledged confusion." U.S. Br. 21. As the language quoted in the government's brief itself demonstrates, the decision that the government cites for this proposition does not express the need for guidance; it expresses *disagreement* with *Geier*, the holding of which that court found to be all too clear. *Morgan*, 680 S.E.2d at 94. But no one in this case asks the Court to overrule or revisit *Geier* – least of all the government, which successfully urged the Court to adopt the *Geier* rule. Because there is no disagreement in the lower courts on the issue actually presented here, that issue is of limited and diminishing importance, and the holding below is correct, further review is not warranted.

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with Congress' goal of uniformity in the motor vehicle industry").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-1314

In the Supreme Court of the United States

DELBERT WILLIAMSON, ET AL., PETITIONERS

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE

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QUESTION PRESENTED

Pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, now codified at 49 U.S.C. 30101 *et seq.*, the National Highway Traffic Safety Administration has promulgated Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. 571.208, which addresses crash protection. In 1993, that provision required automobiles to have a Type 1 (lap) or Type 2 (lap/shoulder) seatbelt in rear non-outboard seating positions. The question presented is:

Whether FMVSS 208 preempts a state common-law tort claim that an automobile manufactured in 1993 was defectively designed because it lacked a Type 2 (lap/shoulder) seatbelt in a rear non-outboard seating position.

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DELBERT WILLIAMSON, ET AL., PETITIONERS

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The question presented in this case is whether Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. 571.208, issued pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act), 49 U.S.C. 30101 *et seq.*, preempts a state common-law tort claim that an automobile manufactured in 1993 was defectively designed because it lacked a Type 2 (lap/shoulder) seatbelt in one of its seating positions. The Secretary of Transportation is responsible for administering the Safety Act, and the United States therefore has a substantial interest in the preemptive effect of a safety standard issued under that statute. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

Petitioners are the estate and survivors of Thanh Williamson. They filed this action against respondents Mazda Motor Corporation and Mazda Motor of America, Inc., the manufacturers of their minivan, alleging that respondents are liable under California common-law tort principles for Ms. Williamson's death from injuries sustained in a car accident. The state trial court entered judgment for respondents on the ground that petitioners' state common-law tort suit is preempted by a federal regulation, FMVSS 208. The Court of Appeal of California affirmed, Pet. App. 1-27, and the Supreme Court of California denied discretionary review, *id.* at 31.

1. The Safety Act requires the Secretary of Transportation to "prescribe motor vehicle safety standards," which are "minimum standard[s] for motor vehicle or motor vehicle equipment performance." 49 U.S.C. 30102(a)(9), 30111(a); see 49 U.S.C. 30101(1). The Secretary has delegated the authority to promulgate safety standards to the National Highway Traffic Safety Administration (NHTSA), an operating administration in the Department of Transportation (DOT). See 49 C.F.R. 1.50(a).

The Safety Act includes a savings clause, which provides that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. 30103(e). Although the Safety Act also includes an express preemption provision, which precludes a state or local government from "prescrib[ing] or continu[ing] in effect" its own standards if those standards differ from an applicable FMVSS, 49 U.S.C. 30103(b)(1), this Court has held that the savings clause removes common-law

tort actions from the scope of the express preemption clause. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 868 (2000).

This case concerns FMVSS 208, 49 C.F.R. 571.208, which is entitled "Occupant crash protection" and which "specifies performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. 571.208(S1). NHTSA issued the original version of FMVSS 208 in 1967, as part of the initial motor vehicle safety standards called for by the Safety Act. 32 Fed. Reg. 2408-2421 (1967). Since its inception, FMVSS 208 has included a requirement to install seatbelts in passenger cars. See *id.* at 2415.

FMVSS 208 refers to two different types of seatbelts. A Type 1 seatbelt is a lap-only seatbelt, "for pelvic restraint." 49 C.F.R. 571.209(S3). A Type 2 seatbelt is a lap and shoulder belt, "a combination of pelvic and upper torso restraints." *Ibid.* The first version of FMVSS 208 required that Type 2 seatbelts be installed for the driver's and right front passenger's seats, and that either Type 1 or Type 2 seatbelts be installed for all other seats. See 32 Fed. Reg. at 2415.

NHTSA has amended FMVSS 208 several times since 1967. At issue in this case is a 1989 modification to the types of seatbelts required for rear seats. The 1989 amendments required manufacturers to install Type 2 (lap/shoulder) seatbelts in all "forward-facing rear outboard designated seating positions," but continued to allow manufacturers to install either Type 1 (lap-only) seatbelts or Type 2 (lap/shoulder) seatbelts in all non-outboard positions. 53 Fed. Reg. 47,982-47,993 (1988) (notice of proposed rulemaking); 54 Fed. Reg. 25,275-25,279 (1989) (final rule applicable to passenger cars); *id.* at 46,257-46,268 (1989) (final rule applicable to

other vehicles, including the multipurpose passenger vehicle at issue here).

An "[o]utboard designated seating position" was defined as a seat less than 12 inches from the side interior wall of the vehicle. 49 C.F.R. 571.3(b) (1990). A "[r]ear outboard designated seating position," in turn, was defined as any such position "that is rearward of the front seat(s)," unless it is "adjacent to a walkway located between the seat and the side of the vehicle, which walkway is designed to allow access to more rearward seating positions." 49 C.F.R. 571.208(S4.2.4.1(b)) (standard for light trucks and multipurpose passenger vehicles); accord 49 C.F.R. 571.208(S4.1.4.2(c)) (same, for passenger cars). Thus, under FMVSS 208 as amended in 1989, Type 2 seatbelts were not required in rear seats adjacent to a walkway or in rear center seats. This case involves a rear seat adjacent to a walkway.[1]

2. a. On August 14, 2002, the Williamson family, consisting of father Delbert, mother Thanh, and daughter Alexa, was traveling in a 1993 Mazda MPV minivan, which FMVSS 208 treats as a multipurpose passenger vehicle. Pet. App. 3; see 49 C.F.R. 571.3(b) (1990). The Mazda MPV has three rows of seats: the front row, with physically separate seats for the driver and a front passenger; the middle row bench, with two seats and an aisle on the right-hand side that allows access to the last row; and the last row bench, with three seats. Delbert

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[1] The standard at issue in this case is no longer in effect for new cars. In response to a congressional directive, see Anton's Law § 5, 49 U.S.C. 30127 note, NHTSA revised its rule to require all passenger cars and multipurpose passenger vehicles with a gross vehicle weight rating of 10,000 pounds or less, if manufactured on or after September 1, 2007, to include Type 2 seatbelts at all rear designated seating positions that face forward. 49 C.F.R. 571.208(S4.1.5.5) and (S4.2.7.1).

was driving and wearing a Type 2 (lap/shoulder) seatbelt. Alexa was sitting directly behind him in the middle-row left outboard seat of the vehicle, also wearing a Type 2 seatbelt. Thanh was sitting in the middle row to Alexa's right. Because that seat was adjacent to the aisle, it was a "non-outboard rear seating position" under FMVSS 208. Thanh wore the Type 1 (lap-only) seatbelt installed by Mazda in that seating position, as FMVSS 208 permitted at the time. Pet. App. 3.

The Williamsons' vehicle collided with another vehicle, and Thanh sustained fatal injuries. Pet. App. 3. Petitioners allege that "the forces generated by th[e] collision caused [Thanh's] body to 'jackknife' around her defective lap[ ]belt, causing severe abdominal injuries and internal bleeding." *Ibid.* (first and third brackets in original); see J.A. 210, 216-217.

b. Petitioners sued respondents in California state court, asserting state common-law tort claims. As relevant here, they alleged that the 1993 Mazda MPV was defective because respondents should have installed a Type 2 seatbelt in Thanh's seating position. J.A. 73, 216-223. Respondents moved for judgment on the pleadings on the ground that federal law preempted this tort claim. J.A. 105-123.

The trial court sustained the preemption defense. The court held that federal law precluded state-law tort actions "to the extent those claims arise from an alleged design defect or failure to warn based on the lack of a lap-shoulder seat belt." J.A. 234-235; see J.A. 194. The court gave petitioners leave to further amend their complaint, J.A.195-196, 234-235, because its ruling did not preclude petitioners from stating a cause of action for "negligen[ce] in how you hooked [the seatbelt] up or negligen[ce] in how you design the seat that was going

to accommodate it, or any other tort theory." J.A. 352. Petitioners stated to the trial court, however, that they were "left with nothing" if federal law preempted their challenge to the type of seatbelt respondents installed in Thanh's seating position. J.A. 362. The trial court therefore sustained respondents' demurrer to the remaining claims arising out of Thanh's death. J.A. 375. The parties then stipulated to dismissal of petitioners' remaining claims with prejudice and entry of final judgment. J.A. 377-383.

4. The Court of Appeal of California affirmed. Pet. App. 1-27. The appellate court's analysis of the preemption of petitioners' defective design claim focused on this Court's decision in *Geier*, *supra*. This Court held in *Geier* that an earlier version of FMVSS 208 preempted common-law tort claims that a manufacturer should have equipped a vehicle with a driver's-side airbag. At issue was the 1984 amendment to FMVSS 208, see 49 Fed. Reg. 28,962-29,010 (1984), which required manufacturers to equip some vehicles with passive restraints. Passive restraints are devices—such as airbags or automatic seatbelts—the effectiveness of which does not depend on any action by a vehicle occupant. The 1984 regulation provided that, after a phase-in period, manufacturers could choose either to install airbags or to install other forms of passive restraints.

This Court held in *Geier* that a common-law duty of care requiring installation of airbags conflicted with FMVSS 208 and, therefore, was preempted under ordinary principles of conflict preemption. 529 U.S. at 874-886. The Court explained that DOT, in promulgating FMVSS 208, "deliberately sought variety—a mix of several different passive restraint systems." *Id.* at 878. For local tort law to provide that a manufacturer's

choice to install passive restraints other than airbags amounted to negligence, the Court reasoned, "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881.

In this case, the state appellate court acknowledged that *Geier* was "distinguishable because it dealt with passive restraints, not seatbelts." Pet. App. 15; accord *id.* at 23. But the court found "persuasive" the reasoning of several lower-court decisions applying *Geier*'s reasoning to cases involving Type 1 seatbelts. *Id.* at 24. Those decisions concluded that FMVSS 208 reflected "NHTSA's decision to allow car manufacturers the option to install either lap-only or lap/shoulder seat belts" at the relevant seating positions—*i.e.*, "the same policy concerns . . . identified in *Geier*." *Id.* at 16, 18 (quoting *Carden* v. *General Motors Corp.*, 509 F.3d 227, 231 (5th Cir. 2007), cert. denied, 128 S. Ct. 2911 (2008), and *Roland* v. *General Motors Corp.*, 881 N.E.2d 722, 727 (Ind. Ct. App.), transfer denied, 898 N.E.2d 1218 (Ind. 2008) (Table)). Following the reasoning of those decisions, the court of appeal held that accepting petitioners' claim "would bar motor vehicle manufacturers from employing one of the passenger restraint options authorized by FMVSS 208," and that petitioners' claim therefore is preempted as "an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208." *Id.* at 23 (citation omitted; brackets in original).

5. The Supreme Court of California denied petitioners' petition for review. Pet. App. 31.

6. This Court granted certiorari, limited to the question whether petitioners' design-defect claim is preempted. See 130 S. Ct. 3348 (2010); Pet. i.

SUMMARY OF ARGUMENT

The Safety Act directs the Secretary of Transportation to establish "minimum standard[s]" and provides that compliance with those standards will not suffice to excuse a manufacturer from liability under state common law. 49 U.S.C. 30102(a)(9); see 49 U.S.C. 30103(e), 30111(a). Accordingly, petitioners' attempt to establish that respondents had a duty under state common law to install a Type 2 seatbelt is not preempted, unless respondents can show that such a state-law duty actually conflicts with the purposes and objectives of FMVSS 208 or the Safety Act. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869-870 (2000). Merely establishing that the state common-law standard is higher than the federal minimum standard is not enough to establish such a conflict. Rather, a conflict results only when the Safety Act (or regulations implementing the Safety Act) does not just set out options for compliance, but also provides that the regulated parties must remain free to choose among those options.

The court of appeal erred in perceiving such a conflict between petitioners' common-law tort action and the policies embodied in the 1989 amendment of FMVSS 208. Although NHTSA decided not to impose a federal requirement to install Type 2 seatbelts in all rear non-outboard seating positions, NHTSA's policy objectives would have been fully met if manufacturers *had* immediately installed Type 2 seatbelts in those positions. By contrast, the decision at issue in *Geier*—to phase in a mixture of airbags and other passive restraints over time—would have been frustrated if state common law had forced all manufacturers to install airbags immediately. The state tort duty in *Geier* therefore conflicted with FMVSS 208; the state tort duty here does not.

In the 1989 rulemaking, NHTSA made plain its intention to retain Type 1 seatbelts as the minimum level of safety, not part of a required mix of devices. NHTSA recognized that Type 2 seatbelts were more effective, that rear-seat passengers were more likely to use them, and therefore that replacing Type 1 seatbelts with Type 2 seatbelts was likely to promote safety. In center seats and other non-outboard seating positions, the costs of making that change would have been higher, and NHTSA accordingly decided not to require such a change as a matter of federal law. But NHTSA never suggested that it wanted manufacturers to retain Type 1 seatbelts; neither technical infeasibility, compatibility with child-safety seats, safe passage through a vehicle's aisle, nor any other consideration suggested that Type 1 seatbelts must remain in use.

This Court should sustain NHTSA's assessment that petitioners' tort action is consistent with the purposes and objectives of the Safety Act and its implementing regulations. The agency's own understanding of the regulatory framework that it implements and administers is the best evidence that the common-law duty on which petitioners rely will not pose an obstacle to the full achievement of those federal purposes and objectives.

ARGUMENT

FMVSS 208 required manufacturers of vehicles for the 1993 model year to install at least a Type 1 seatbelt at rear non-outboard seating positions, and permitted them to install a Type 2 seatbelt. That minimum standard requiring at least a Type 1 seatbelt does not preempt a state common-law duty that requires manufacturers to install the safer Type 2 seatbelt. The court of

appeal, however, concluded that FMVSS 208 embodied not just a minimum safety standard, but a policy judgment by NHTSA that manufacturers must remain free, unencumbered by external constraints, to choose either Type 1 or Type 2 seatbelts for the relevant seating positions. That conclusion was incorrect: although NHTSA in 1989 chose not to require the universal adoption of Type 2 seatbelts, it had no objection to the immediate installation of such belts in all rear seats, and it did not adopt a provision seeking to ensure that manufacturers would have an unencumbered and free choice to install either Type 1 or Type 2 seatbelts. That sets this case apart from *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), in which the agency affirmatively rejected, as counterproductive, any rule that would have mandated the immediate and universal adoption of airbags instead of a gradually evolving mix of airbags and other passive restraints. Because petitioners' common-law tort action does not conflict with any federal goal embodied in FMVSS 208 or the Safety Act, it is not preempted.

A. Under The Safety Act, A Common-Law Tort Action Is Saved From Preemption Unless It Actually Conflicts With A Federal Standard

Under the Safety Act, a safety standard is a "minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. 30102(a)(9). And under the Safety Act's savings clause, compliance with such a minimum standard does not in itself "exempt a person from liability at common law." 49 U.S.C. 30103(e). Thus, petitioners' cause of action is saved from preemption by the savings clause unless it actually conflicts

with the purposes and objectives of FMVSS 208 or the Safety Act. *Geier*, 529 U.S. at 869-870.

As this Court explained in *Geier*, Congress included the savings clause to preserve a substantial role for state tort law in compensating accident victims and promoting safety in automobile design. 529 U.S. at 871. To be sure, the savings clause does not displace ordinary principles of conflict preemption: state law is preempted if it conflicts with a federal standard. *Id.* at 869-870. But the Court explained that the application of those conflict-preemption principles will, in all likelihood, "leav[e] adequate room for state tort law to operate" and allow a "significant number of common-law liability cases" to go forward. *Id.* at 868.

Under "ordinary pre-emption principles, grounded in longstanding precedent," *Geier*, 529 U.S. at 874, state law is preempted not only when it is "'impossible' for private parties to comply with both state and federal law," *id.* at 873, but also when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). In a traditional field of state regulation, this Court generally proceeds on the "assumption" that a state law poses no such obstacle to the accomplishment of a federal purpose. *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194-1195 (2009) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). But that assumption may be countered in a particular case by a showing that, inter alia, "the state policy may produce a result inconsistent with the objective of the federal statute," *Rice*, 331 U.S. at 230, or, as in *Geier*, with the objective of an implementing regulation.

B. A State-Law Requirement Ordinarily Is Not Preempted Merely Because It Exceeds A Federal Minimum Standard

This Court explained throughout its opinion in *Geier* that the paradigmatic example of a tort action that does *not* conflict with the Safety Act's purposes—and thus is not preempted—is a state liability rule that "seek[s] to establish greater safety than the minimum safety achieved by a federal regulation *intended to provide a floor*." 529 U.S. at 870 (emphasis added). Thus, a "minimum safety standard" ordinarily will not preempt a state common-law rule of decision that imposes a higher standard. *Id.* at 868. For that reason, this Court in *Geier* found implied preemption not simply because NHTSA permitted more than one passive-restraint device to satisfy its standards, but because NHTSA affirmatively and "deliberately sought variety—a mix of several different passive restraint systems," *id.* at 878—and "deliberately sought a *gradual* phase-in of passive restraints," *id.* at 879.

1. In the 1984 amendment to FMVSS 208, NHTSA phased in the passive-restraint requirement and deliberately allowed manufacturers to choose among several types of passive restraints, so that a variety of passive restraints would be available on the market. NHTSA specifically had rejected a proposed "all airbag" standard because of safety concerns, arising partly from the potential for a public backlash to an airbag mandate. *Geier*, 529 U.S. at 879. As this Court explained, NHTSA concluded that allowing manufacturers to choose among passive restraints "would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the devel-

opment of alternative, cheaper, and safer passive restraint systems. And it would thereby build public confidence." *Ibid.* (citing 49 Fed. Reg. at 28,990, 29,001-29,002); accord *Wyeth*, 129 S. Ct. at 1203.

The Court in *Geier* contrasted that affirmative policy choice with a simple minimum standard. As the Court noted, the government had offered as an example the safety standard that establishes minimum requirements for brakes, which permits, but does not require, antilock brakes. That standard does not preempt a common-law claim contending that antilock brakes should have been installed. 529 U.S. at 868 (citing 49 C.F.R. 571.105 (1999)). Indeed, if a federal minimum standard, without more, were enough to preempt any state law setting a higher floor, *every* FMVSS would be preemptive, because every FMVSS promulgated under the Safety Act is, by definition, "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. 30102(a)(9). See also *Wyeth*, 129 S. Ct. at 1202-1203 (contrasting the framework at issue in *Geier*, in which the state-law mandate would have upset "the balance [NHTSA] had struck," with one in which federal law set "a floor upon which States could build").

Respondents acknowledged at the petition stage (Supp. Br. 2) that a minimum standard set out in the FMVSS does not by itself preempt stricter state common law as a basis for liability. Rather, like the court of appeal, they contend that the safety standard at issue in this case did more than just set a federal minimum standard requiring *at least* a Type 1 seatbelt at all rear non-outboard seating positions. The court of appeal concluded, and respondents urge, that NHTSA instead made a "deliberate," policy-driven "decision to *allow* manufacturers the *option* of selecting between the two seat belt

designs," *i.e.*, to authorize manufacturers to choose either one at will. Pet. App. 20 (quoting *Carden* v. *General Motors Corp.*, 509 F.3d 227, 232 (5th Cir. 2007), cert. denied, 128 S. Ct. 2911 (2008)) (emphasis added). The court of appeal's decision, therefore, turned on its erroneous view that the seatbelt standard embodied the same sort of policy judgment by NHTSA that underlay the passive-restraint standard that this Court considered in *Geier*. The court of appeal was mistaken, as shown below.

C. The Rear Seatbelt Rule Did Not Affirmatively Seek To Promote Diverse Seatbelt Designs Or To Preserve A Role For Type 1 Seatbelts

In the passive-restraint rulemaking, NHTSA rejected the view that "the more airbags, and the sooner, the better." *Geier*, 529 U.S. at 874. In the seatbelt rulemaking, by contrast, NHTSA made clear that it *agreed* that installing more Type 2 seatbelts, and installing them sooner, would be better, even though it stopped short of mandating Type 2 seatbelts at every possible seating position. That difference in approach separates this case from *Geier* and defeats respondents' claim of preemption.

1. Between 1967 and 1989, NHTSA did not require Type 2 seatbelts in any rear seating positions. The original 1967 version of FMVSS 208 required manufacturers to install either Type 1 or Type 2 seatbelts for all rear passenger seating positions. See 32 Fed. Reg. at 2415. In 1984, NHTSA denied a petition for rulemaking to require Type 2 seatbelts for all passenger cars' rear outboard seating positions. 49 Fed. Reg. at 15,241-15,242; see also 53 Fed. Reg. at 47,982. That petition for rulemaking had sought such a standard primarily to facili-

tate the use of a type of booster seat for children that was held in place by Type 2 seatbelts (rather than by tethers, which at the time were more widely used to secure child restraints), although the petition also noted that adult passengers could benefit from Type 2 seatbelts in rear outboard seating positions. 49 Fed. Reg. at 15,241. Rejecting the proposal, NHTSA stated that "child restraint systems and child booster seats equipped with tethers offer greater protection for children when those tethers are attached than when those seats and systems are held in place by Type 2 belts." *Ibid.* Further, although NHTSA agreed with the view that "Type 2 belts in rear seats might give some added degree of protection to adults," the agency concluded that "the benefits, if any, to be gained by replacing the Type 1 belts with Type 2 belts for adults would not justify the additional cost." *Id.* at 15,241-15,242.

2. In 1987, NHTSA decided that the time had come to propose a reversal of its earlier decision and to require Type 2 seatbelts in at least some rear seating positions. 53 Fed. Reg. at 47,982-47,993. The agency proposed what would become the 1989 amendments to FMVSS 208, requiring Type 2 seatbelts in all rear outboard seating positions in (inter alia) passenger cars and multipurpose passenger vehicles such as petitioners' minivan. *Id.* at 47,982. In the 1988 notice of proposed rulemaking (NPRM) and the subsequent final rules, NHTSA explained the main reasons for its change in position since 1984. First, more people had begun to use rear seatbelts, primarily because of new state seatbelt laws. *Id.* at 47,983. Second, more people could be expected to wear lap-shoulder belts in rear seats because of greater familiarity with them as a result of using them in front seats. *Ibid.* Third, rear-seat Type 2 seat-

belts were "even more effective" in reducing the risk of death than Type 1 seatbelts, and NHTSA expected that greater effectiveness to result in "progressively greater safety benefits" as more rear-seat occupants used their seatbelts. 54 Fed. Reg. at 25,276 (final rule applicable to passenger cars); *id.* at 46,257-46,258 (final rule applicable to other vehicles). Fourth, many manufacturers had voluntarily installed Type 2 seatbelts in rear outboard seats, and as a result, the cost of requiring all manufacturers to do so had diminished substantially. *Id.* at 46,258. Fifth, child restraint systems had shifted away from those requiring a tether anchor. NHTSA determined that Type 2 seatbelts would "offer benefits for children riding in some types of booster seats, would have no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts, and would offer older children the same incremental safety protection" as adults. 53 Fed. Reg. at 47,988-47,989; see *id.* at 47,983; 54 Fed. Reg. at 25,276.

The 1988 NPRM also explained why NHTSA had decided not to propose requiring manufacturers to install Type 2 seatbelts for rear inboard seating positions. The agency stated that there would be "more technical difficulties" associated with installing Type 2 seatbelts in rear inboard seating positions than in rear outboard seating positions. 53 Fed. Reg. at 47,984. Additionally, regardless of the technical difficulties, such a requirement would yield "small safety benefits and substantially greater costs." *Ibid.* The agency acknowledged that "some aisle seating positions," such as the one at issue in this case, "may not be covered by [the] proposed requirement" to install Type 2 seatbelts, as "the seating positions next to the aisle on the right hand side of many

passenger vans * * * may *not* be outboard seating positions, because they may be more than 12 inches from the inside of the vehicle." *Id.* at 47,985.

3. In adopting its final rule amending FMVSS 208 for multipurpose passenger vehicles, NHTSA reemphasized its rationale for not requiring Type 2 seatbelts in rear inboard seats. 54 Fed. Reg. at 46,257-46,268. The agency stated that no commenters had "presented any new data that would cause the agency to change its tentative conclusion," enunciated in the 1988 NPRM, that requiring Type 2 seatbelts in rear inboard positions would be "technical[ly] difficult[]" and "would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." *Id.* at 46,258.

NHTSA also stated when it promulgated its final rule that it had decided not to require Type 2 seatbelts for rear seating positions adjacent to an aisle, whether or not those seats were technically "outboard" seats—*i.e.*, less than 12 inches from the side wall of the vehicle. 54 Fed. Reg. at 46,258. The agency "did not mean to suggest" that FMVSS 208 would require manufacturers to install shoulder belts "at seating positions where they would obstruct an aisle designed to give access to rear seating positions." *Ibid.* Significantly, however, NHTSA also stated that, "[o]f course, in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with the aisleway's purpose of allowing access to more rearward seating positions, *NHTSA encourages the manufacturers to do so.*" *Ibid.* (emphasis added).

4. Thus, in its final rule, NHTSA was not seeking to encourage variety in seatbelt design or to foster a mix of

Type 1 and Type 2 seatbelts. To the contrary, NHTSA showed a clear preference for Type 2 seatbelts and even encouraged manufacturers to install them for inboard seating positions adjacent to an aisle (the type of seat at issue in this case). The reasons why NHTSA did not mandate Type 2 seatbelts at those positions pertained to its assessment at the time of the technological difficulties, costs, and benefits of such a requirement.

NHTSA's contemporaneous explanation of its 1989 rear seatbelt amendments stands in sharp contrast to the agency's reasoning with respect to airbags and other passive restraints, discussed in *Geier*. There, the agency affirmatively explained in its rulemaking notices that it wished to provide for and encourage the availability of several options for passive restraints over a period of time, to help achieve the ultimate purpose of the regulation—the reduction of highway deaths and injuries. That purpose of promoting safety by fostering a variety of passive-restraint devices would have been frustrated by a state common-law duty to install airbags in all vehicles. Here, by contrast, NHTSA simply left in place a minimum standard requiring at least Type 1 seatbelts for rear inboard and aisle seats, based on its assessment at the time of technical feasibility and cost-benefit analyses (which are common to virtually all NHTSA rulemakings setting an FMVSS), while still encouraging manufacturers to install Type 2 seatbelts in those seats. Thus, the existence of the purported "option" to install either Type 1 or Type 2 seatbelts was *not* the result of a NHTSA policy of affirmatively encouraging diversity and freedom of choice, as in *Geier*—a policy that would be frustrated by a rule of liability based on the failure to adopt a single course rather than diverse solutions. Rather, it was simply the byproduct of NHTSA's setting

of a minimum standard that could be satisfied in more than one way.

Manufacturers always have the "option" of exceeding a minimum safety standard when NHTSA has decided to permit, not to mandate, a more stringent alternative because of considerations of cost or feasibility—as NHTSA did in this case and, indeed, often does in considering regulatory alternatives. But if such an "option" alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined. *Geier* does not mandate that result.

D. The Rear Seatbelt Rule Does Not Embody Any Preemptive Policy

The court of appeal was correct to observe that NHTSA's determination not to require Type 2 seatbelts was reached through careful consideration and based on sound reasons. But as this Court's cases establish, a determination that a federal agency's decision not to impose a particular regulation was "intentional and carefully considered" is not enough to show that the agency also precluded the States from imposing the same requirement. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 67 (2002). And here, the rear seatbelt rule does not embody "an authoritative federal determination that the [issue of rear-seat shoulder belts] is best left *un*regulated," *id.* at 66 (quoting *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). Cf. *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 148-151 (1976) (state law preempted where federal law was intended to leave conduct unregulated and subject to free play of economic forces). In other words, the agency did not "consider and reject"

any imposition of a higher safety standard. *Wyeth*, 129 S. Ct. at 1203 n.14.

1. Respondents cannot sustain the state court's ruling on grounds specific to aisle seating positions

As an initial matter, respondents cannot properly recast their preemption theory into one about aisle seating positions alone. In their supplemental brief at the petition stage, respondents asserted for the first time that their preemption defense is based on considerations specific to the particular type of non-outboard seating position that Ms. Williamson occupied, *i.e.*, a seating position adjacent to an aisle. That contention was not passed upon below and is not properly presented at this stage of the case, which came to this Court as a preemption case involving rear non-outboard seats generally. In any event, NHTSA made clear in adopting FMVSS 208 that it "encouraged" manufacturers to install the safer Type 2 seatbelts at aisle positions if they could do so without blocking access to rearward seats, 54 Fed. Reg. at 46,258; plainly, therefore, the agency saw no insurmountable safety obstacle to installing Type 2 seatbelts in seating positions next to an aisle.

Petitioners framed their preemption question to apply to all rear seating positions. See, *e.g.*, Pet. 13. As the government noted at the petition stage, respondents did not suggest in their brief in opposition that the preemption analysis should differ based on whether the accident victim was in a "true" center seat or in an aisle seat. U.S. Invitation Br. 19 n.3.[2] Only in a supplemental

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[2] Nor did respondents make such an argument below. See, *e.g.*, Resp. C.A. Br. 13 ("center rear seating positions"; "middle row center seat"); *id.* at 16 ("all rear row center seating positions"); *id.* at 26 ("rear center seating position").

brief, filed after the government filed its amicus brief recommending that certiorari be granted, did respondents suggest that this case could be resolved on considerations "unique" to aisle seats. Supp. Br. 7. Accordingly, respondents should not now be heard to argue that seatbelt claims involving *aisle* seats are preempted even if seatbelt claims involving center seats are not. See Sup. Ct. R. 15.2.

In any event, NHTSA's decision to treat aisle seats as inboard seating positions for purposes of the seatbelt standard offers respondents no help. NHTSA's decision did not rest on any desire to ensure the continued availability of Type 1 seatbelts in aisle seats, or on any concern that Type 2 seatbelts would necessarily be unsafe in that position. To the contrary: as noted above, NHTSA affirmatively "encourage[d]" the installation of Type 2 seatbelts, even in rear aisle seating positions. 54 Fed. Reg. at 46,258. See also pp. 27-29, *infra*.

2. Respondents have not identified any federal policy requiring that Type 1 seatbelts remain available

Respondents, and various lower courts, have suggested that NHTSA wished to guarantee the continued availability of Type 1 seatbelts based on various considerations of cost, child safety, and seatbelt promotion. Those contentions lack merit.

a. *Seatbelt utilization.* Some courts have surmised that NHTSA sought affirmatively to guarantee that manufacturers could continue to install Type 1 seatbelts as a way of promoting seatbelt usage. See, *e.g.*, Pet. App. 18; *Griffith* v. *General Motors Corp.*, 303 F.3d 1276, 1281-1282 (11th Cir. 2002) (citing *Hurley* v. *Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000), cert. denied, 531 U.S. 1148 (2001)), cert. denied, 538 U.S.

1023 (2003).[3] NHTSA certainly did seek to promote safety by increasing the rate of seatbelt usage. See, *e.g.*, *Geier*, 529 U.S. at 877. But it sought to do so by encouraging the switch to Type 2 seatbelts, not by retaining Type 1 seatbelts.

As the agency explained in its 1988 NPRM, seatbelt use was much higher in front seats, where Type 2 seatbelts were required, than in rear seats. As a result, when passengers "g[ot] into the habit" of wearing a seatbelt, it was a *Type 2* seatbelt. 53 Fed. Reg. at 47,983. "Thus," the agency concluded, "the presence of lap/shoulder belts in the rear seat should result in an increase in rear seat belt use," not a decrease. *Id.* at 47,983-47,984.[4] See also *id.* at 47,982, 47,983 (NHTSA's conclusion that Type 2 seatbelts were more effective than Type 1 seatbelts); 54 Fed. Reg. at 46,257 (same). Because Type 2 seatbelts were both more popular and more effective, there is no reason to think that NHTSA would have wanted to promote Type 1 seatbelts to cater to consumer preference. And indeed, the agency encouraged manufacturers to implement the switch to Type 2 as quickly as possible. See *id.* at 46,265 (allowing some lead time before implementation, but noting that "[e]arlier compliance is also permitted and encouraged").

b. *Cost-benefit analysis.* Respondents have emphasized that NHTSA referred to cost-benefit concerns when it decided not to mandate Type 2 seatbelts at rear

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[3] *Griffith* involved a tort claim based on the failure to install Type 2 seatbelts in the *front* center seat of a pickup truck.

[4] That conclusion has since been confirmed empirically. See 69 Fed. Reg. 70,905 (2004) (reporting that a 1999 NHTSA study found that seatbelt use was seven to ten percent higher in rear outboard seating positions with a Type 2 seatbelt).

non-outboard seating positions. See, *e.g.*, Pet. Stage Supp. Br. 7. Some lower courts have likewise contended that NHTSA's cost-benefit calculus represents a federal policy with which state tort law may not interfere. See, *e.g.*, *Carden*, 509 F.3d at 232. But a determination that mandating a particular safety standard is not economically justified under a specific federal statutory framework at a particular point in time is not enough to establish implied conflict preemption.

The Court made that point clear in its unanimous decision in *Sprietsma*. The Coast Guard has authority to promulgate "minimum safety standards" under the Federal Boat Safety Act of 1971 (Boat Safety Act), 46 U.S.C. 4302(a)(1). The agency decided not to invoke that authority to require boats to install propeller guards, in part because "the question of retrofitting millions of boats would certainly be a major economic consideration." *Sprietsma*, 537 U.S. at 66; see *id.* at 60-61. As this Court explained, that cost-benefit consideration reflected only the Boat Safety Act's "'stringent' criteria for federal regulation"; it did not represent a judgment that no State or locality could impose a propeller-guard requirement. *Id.* at 66-67.

So too here. The Safety Act requires NHTSA to consider "whether a proposed standard is reasonable, practicable, and appropriate," among other factors. 49 U.S.C. 30111(b)(3). "This qualifying language was added to ensure that NHTSA would 'consider reasonableness of cost, feasibility and adequate lead time.'" *E.g.*, *Center for Auto Safety* v. *Peck*, 751 F.2d 1336, 1343 (D.C. Cir. 1985) (Scalia, J.) (quoting S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966)). But in considering those factors in administering the federal statute, NHTSA does not purport to set national policy that would super-

sede the ability of a state court, in applying the distinct body of state common-law tort principles, to assess costs and benefits for itself. See generally, *e.g.*, *Hurley*, 222 F.3d at 380-381 (noting that Illinois products-liability law requires proof of an alternative, economical design).

In *Geier*, this Court listed the high cost of airbags among the seven "significant considerations" that motivated NHTSA to adopt its gradual phase-in of airbags as part of a mixture of passive restraints. 529 U.S. at 877. But the cost factor had a direct impact on safety: an airbag must be replaced each time it deploys, and drivers might balk at the replacement cost and choose instead to drive without the protection of *any* passive restraint. *Id.* at 878. By contrast, NHTSA gave no indication that it thought the cost of installing Type 2 seatbelts would deter passengers from using them; to the contrary, NHTSA thought that replacing Type 1 with Type 2 seatbelts would actually *encourage* seatbelt use. See pp. 21-22, *supra*.

c. *Child safety.* Respondents have previously argued that NHTSA did not mandate Type 2 seatbelts for rear inboard seating positions in the final rule because of agency concerns about the seatbelts' compatibility with child restraint systems. See, *e.g.*, Pet. Stage Supp. Br. 4, 5, 7-8. Such a rationale for allowing Type 1 seatbelts in rear non-outboard seating positions, however, does not appear anywhere in either the 1988 NPRM or the final 1989 amendment of FMVSS 208. Both the NPRM and final rule discuss the compatibility of child restraint systems with Type 2 seatbelts generally—*i.e.*, at any rear seating position, not just in the non-outboard seats involved in this case. Nor did NHTSA suggest that compatibility with child restraints was a reason to

keep Type 1 seatbelts available at certain seating positions—inboard or otherwise.

In 1984, NHTSA declined to require Type 2 seatbelts in *any* rear seating position because, it concluded at the time, neither child safety nor adult safety would justify such a requirement. NHTSA believed that tether systems, then in common use, were preferable to Type 2 seatbelts as a means of securing child seats. NHTSA also determined at the time that child seats without tethers worked better with Type 1 seatbelts. And adults used seatbelts in rear seats so rarely that the incremental safety benefit would not justify the considerable cost. 49 Fed. Reg. at 15,241-15,242; see 53 Fed. Reg. at 47,982-47,983.

By the time of the 1988 NPRM, the agency explained, those considerations were no longer controlling. More adults were buckling up in the back seat, so the benefit of installing Type 2 seatbelts in those positions was increasing. And tethered child seats were no longer in widespread use. 53 Fed. Reg. at 47,983.

Significantly, moreover, NHTSA determined that Type 2 seatbelts were compatible with child safety seats. In response to some concerns, NHTSA had specifically solicited comments on that issue. 53 Fed. Reg. at 47,988.[5] And in the final rule, NHTSA concluded that Type 2 seatbelts could safely and tightly secure a child safety seat. 54 Fed. Reg. at 46,262.[6]

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[5] As part of its request for comment in the NPRM, NHTSA inquired whether Type 2 seatbelts might be too short to fit around a child safety seat. 53 Fed. Reg. at 47,988. That concern did not occasion further discussion in the final rule.

[6] One amicus suggested otherwise in the courts below. See Alliance of Auto. Mfrs. C.A. Amicus Br. 13 n.3, 19. The 1992 source that the amicus cited, however, confirms that Type 2 seatbelts were adequate to

NHTSA did receive comments regarding the possibility that seatbelts (whether Type 1 or Type 2) equipped with a particular type of *retractor* would be unsuitable for use with child restraint systems such as car seats. 53 Fed. Reg. at 47,988. Emergency locking retractors (ELRs) make seatbelts more comfortable for adults, because they allow the seatbelt strap to spool out under normal conditions, but lock tightly in an emergency such as a sudden stop. A car seat secured by a seatbelt with an ELR therefore could move around somewhat, and some commenters expressed concern that that movement might make the car seat unstable or unreliable. *Ibid.*; 54 Fed. Reg. at 46,261-46,262. NHTSA accordingly decided to modify the standards for seatbelts with ELRs—both Type 1 and Type 2 seatbelts—to ensure that the lap portion of the belt could be locked to hold a child seat securely. *Id.* at 46,261-46,262, 46,267; see also 56 Fed. Reg. 63,914 (1991) (supplemental notice of proposed rulemaking on this subject); 58 Fed. Reg. 52,922 (1993) (final rule).

Thus, NHTSA's regulatory response ensured that Type 2 seatbelts would be just as efficacious as Type 1 seatbelts in securing child seats. NHTSA certainly did not endorse the notion that child safety depended on the continued availability of Type 1 seatbelts—whether in rear non-outboard seating positions or anywhere else.

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secure child safety seats. Department of Transp., NHTSA, *Child Passenger Safety Resource Manual* 87 (1992) (child safety seats "can be used with lap/shoulder belts as well" as with lap belts); *id.* at 88 ("The center rear seating position often has a belt that is tightened by hand and therefore usually poses fewer compatibility problems. If there is no center rear seating position or if you are transporting more than one child, the child safety seat can be installed in another location with a lap or lap/shoulder belt.").

Indeed, in non-outboard seating positions such as the one at issue in this case, ELRs were not required at all, see 49 C.F.R. 571.208(S7.1.1.3) (1990), and NHTSA's discussions of child safety in proposing and finally promulgating the rule did not discuss outboard versus inboard seating positions.

NHTSA thus did not rely on compatibility with child restraint systems in deciding not to require Type 2 seatbelts in rear inboard seating positions. At most, that concern contributed to NHTSA's 1984 decision not to require Type 2 seatbelts in *any* rear seating positions, see 49 Fed. Reg. at 15,241; pp. 14-15, *supra*, a decision substantially reversed by the rulemaking at issue in this case. And although the question of how best to use seatbelts to secure child safety seats persisted, the question of whether to continue to permit Type 1 seatbelts at inboard seating positions was settled with the adoption of the final rule in 1989.

d. *Technical difficulties associated with aisle seats.* NHTSA offered two principal reasons for exempting aisle seating positions. First, NHTSA acknowledged that if the shoulder belt were anchored on the side wall of the vehicle, then the shoulder belt strap would have to extend across the aisle and might "cause entry and exit problems" for passengers using the aisle to reach the rearmost seats. 54 Fed. Reg. at 46,258. The agency stated that it did not wish to impose a safety standard that would cause shoulder belts to "obstruct an aisle." *Ibid.* But, NHTSA explained, this was a "practical difficult[y]," rather than an insuperable technical obstacle: "[t]o avoid such difficulties," the shoulder belt could be anchored on the roof instead of the side wall. *Ibid.*

Second, leaving the aisle clear by installing a roof anchorage would require structural modifications to the

roof, which the agency agreed "would impose disproportionately high costs" relative to the anticipated safety benefits. 54 Fed. Reg. at 46,258. The agency accordingly decided not to mandate that step as a matter of federal law. "Of course," the agency added, "in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with * * * access to [the rearmost seats], NHTSA encourages the manufacturers to do so." *Ibid.*

Under the regulatory framework of the Safety Act, the "practical" and "technical difficulties" that NHTSA identified were sufficiently significant to justify keeping Type 1 seatbelts as the minimum level of crash protection in aisle seats and not mandating Type 2 seatbelts for those seats as a matter of federal law. But NHTSA did not suggest that those difficulties could not safely be overcome; indeed, throughout the rule, NHTSA acknowledged that some of the safety steps that it *did* mandate would be technically difficult, but expressed confidence that manufacturers could meet the challenge.[7] And in fact, manufacturers voluntarily installed Type 2 seatbelts in aisle seats as early as 1991, resolving some of these practical difficulties by making the seatbelt anchorage detachable. See 69 Fed. Reg. 70,909 (2004).

Furthermore, as explained above, pp. 22-24, *supra*, NHTSA's determination that these structural changes were too costly to justify NHTSA's requiring them as a matter of federal prescriptive law was not a determina-

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[7] For instance, applying the new Type 2 seatbelt requirement to minivans and other multipurpose passenger vehicles required "structural changes" and posed some technical "difficulties," but "NHTSA ha[d] no reason to believe that these difficulties [could not] be overcome." 53 Fed. Reg. at 47,986.

tion that they were also too costly to be installed at all, or to be required for compliance with a duty under a particular State's common law of torts.

E. This Court Should Give Weight To NHTSA's Expert Conclusion That Petitioners' Tort Theory Does Not Conflict With FMVSS 208

The government has consistently maintained that a minimum safety standard provided in a FMVSS, without more, does not conflict with a stricter state requirement. As this Court explained in *Geier*, because the agency has a "thorough understanding of its own regulation and its objectives" and a "unique[]" perspective on whether state requirements conflict with federal standards, "the agency's own views should make a difference" in the conflict-preemption analysis. 529 U.S. at 883 (citation omitted); accord, *e.g.*, *Wyeth*, 129 S. Ct. at 1201 (noting that agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle'"); *Sprietsma*, 537 U.S. at 67-68; see also *Bates* v. *Dow Agroscis. LLC*, 544 U.S. 431, 455 (2005) (Breyer, J., concurring).

Although the Court has noted that an agency's view that a state law *is* preempted is not dispositive, *Wyeth*, 129 S. Ct. at 1201, in implied-preemption cases the Court has given considerable weight to the responsible federal agency's representation that a state law does *not* interfere with the policies or objectives of the federal statute and regulations the agency administers. See, *e.g.*, *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538, 549 (2008); *Sprietsma*, 537 U.S. at 67-68. That is particularly so where, as here, the agency has spoken with a

consistent voice for a lengthy period of time. *Wyeth*, 129 S. Ct. at 1201.

The United States has taken the position set out above in a series of briefs dating back to 1990. In each, the United States has consistently maintained to this Court that a FMVSS permitting a manufacturer to choose among different options consistent with a minimum standard does not alone preempt state common-law tort claims seeking to impose liability for selecting one option instead of another.

In its amicus brief in *Wood* v. *General Motors Corp.*, 494 U.S. 1065 (1990), submitted at this Court's invitation, the United States stated that "the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted." U.S. Amicus Br. at 15, *Wood*, *supra* (No. 89-46). The United States reiterated that position in its amicus brief in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), which stated that the government did "not agree" with the "broader theory of implied preemption" that some lower courts had advanced —"*i.e.*, that the existence of 'options' to comply with [FMVSS] 208 in itself precludes state-court judgments based on the failure to install one particular option." U.S. Amicus Br. at 29 n.16, *Freightliner Corp.*, *supra* (No. 94-286). And the United States' amicus brief in *Geier* itself echoed that position: "We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose." U.S. Amicus Br. at 21 n.18, *Geier*, *supra* (No. 98-1811). See also *Geier*, 529 U.S. at 883 ("DOT has explained FMVSS 208's objec-

tives, and the interference that 'no airbag' suits pose thereto, consistently over time.").

That principle is dispositive here. Under the 1989 amendments to FMVSS 208, Type 1 seatbelts remained only a minimum standard for passenger safety in rear non-outboard seats. Thus, under the Safety Act's savings clause as construed in *Geier*, maintenance of that minimum standard as a matter of federal prescriptive law does not preempt a state common-law cause of action based on a duty to install more stringent safety protection in the form of Type 2 seatbelts.

CONCLUSION

The judgment of the Court of Appeal of California should be reversed.

Respectfully submitted.

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APPENDIX

1. 49 U.S.C. 30101 provides:

Purpose and policy

The purpose of this chapter is to reduce traffic accidents and deaths and injuries resulting from traffic accidents. Therefore it is necessary—

(1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and

(2) to carry out needed safety research and development.

2. 49 U.S.C. 30102 provides in pertinent part:

Definitions

(a) GENERAL DEFINITIONS.--In this chapter—

* * * * *

(9) "motor vehicle safety standard" means a minimum standard for motor vehicle or motor vehicle equipment performance.

* * * * *

3. 49 U.S.C. 30103 provides in pertinent part:

Relationship to other laws

* * * * *

(e) COMMON LAW LIABILITY.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

4. 49 U.S.C. 30111 provides in pertinent part:

Standards

(a) GENERAL REQUIREMENTS.—The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.

(b) CONSIDERATIONS AND CONSULTATION.—When prescribing a motor vehicle safety standard under this chapter, the Secretary shall—

(1) consider relevant available motor vehicle safety information;

(2) consult with the agency established under the Act of August 20, 1958 (Public Law 85-684, 72 Stat. 635), and other appropriate State or interstate authorities (including legislative committees);

(3) consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which the standard will carry out section 30101 of this title.

* * * * *

5. 49 C.F.R. 571.3 (1990) provided in pertinent part:

Definitions

* * * * *

(b) *Other definitions.* As used in this chapter—

* * * * *

Outboard designated seating position means a designated seating position where a longitudinal vertical plane tangent to the outboard side of the seat cushion is less than 12 inches from the innermost point on the inside surface of the vehicle at a height between the seating reference point and the shoulder reference point (as shown in fig. 1 of Federal Motor Vehicle Safety Standard No. 210) and longitudinally between the front and rear edges of the seat cushion.

* * * * *

6. 49 C.F.R. 571.208 provides in pertinent part:

Standard No. 208; Occupant crash protection.

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the

severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

* * * * *

S4. *General requirements.*

* * * * *

S4.1.4.2. * * *

(b) Except as provided in S4.1.4.2.1 and S4.1.4.2.2, each passenger car, other than a convertible, manufactured on or after September 1, 1990 and each convertible passenger car manufactured on or after September 1, 1991 shall be equipped with an integral Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed in compliance with this requirement shall comply with Standard No. 209 (49 CFR 571.209) and with S7.1 and S7.2 of this standard. * * *

(c) As used in this section, "rear outboard designated seating position" means any "outboard designated seating position" (as that term is defined at 49 CFR 571.3) that is rearward of the front seat(s), except any designated seating position adjacent to a walkway that is located between the seat and the near side of the vehicle and is designed to allow access to more rearward seating positions.

* * * * *

S4.2.4. *Rear outboard seating positions in trucks and multipurpose passenger vehicles manufactured on or after September 1, 1991 with a GVWR of 10,000*

pounds or less. Except as provided in S4.2.4.2 and S4.2.4.3, each truck and each multipurpose passenger vehicle, other than a motor home, manufactured on or after September 1, 1991 that has a gross vehicle weight rating of 10,000 pounds or less shall be equipped with an integral Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed in compliance with this requirement shall comply with Standard No. 209 (49 CFR 571.209) and with S7.1 and S7.2 of this standard. If a Type 2 seat belt assembly installed in compliance with this requirement incorporates any webbing tension- relieving device, the vehicle owner's manual shall include the information specified in S7.4.2(b) of this standard for the tension relieving device, and the vehicle shall comply with S7.4.2(c) of this standard.

S4.2.4.1. As used in this section—

* * * * *

(b) Rear outboard designated seating position means any "outboard designated seating position" (as that term is defined at 49 CFR 571.3) that is rearward of the front seat(s), except any designated seating positions adjacent to a walkway located between the seat and the side of the vehicle, which walkway is designed to allow access to more rearward seating positions.

* * * * *

6. 49 C.F.R. 571.209 provides in pertinent part:

Standard No. 209; Seat belt assemblies.

* * * * *

S3. *Definitions.* * * *

* * * * *

Type 1 seat belt assembly is a lap belt for pelvic restraint.

Type 2 seat belt assembly is a combination of pelvic and upper torso restraints.

* * * * *

No. 08-1314

In the

Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Three

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., AND NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Alliance of Automobile Manufacturers ("Alliance") and the Association of International Automobile Manufacturers, Inc. ("AIAM") are non-profit national trade organizations whose member companies represent all of the major manufacturers of passenger vehicles sold in the United States. Respondent Mazda Motor of America, Inc. is a member of the Alliance.[2] The National Automobile Dealers Association ("NADA") is a non-profit national trade association representing 17,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service,

---

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

[2] The Alliance's other members are BMW Group, Chrysler Group LLC, Ford Motor Co.; General Motors Corp.; Jaguar Land Rover, Mercedes-Benz USA, Mitsubishi Motors North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; Volkswagen of America, Inc.; and Volvo Cars North America, LLC. AIAM's members are Aston Martin; American Honda Motor Co., Inc.; American Suzuki Motor Corp.; Ferrari; Hyundai Motor America; Isuzu Motor America, Inc.; KIA Motors America, Inc.; Maserati; McLaren Automotive; Mitsubishi Motor Sales of America, Inc.; Nissan; Peugeot; Porsche Cars of North America, Inc.; Saab Cars USA, Inc.; Subaru of America, Inc.; and Toyota Motor Sales USA, Inc.

repair, and parts sales. Together, the members of NADA employ upwards of 1,000,000 people nationwide.

The Alliance, AIAM, and NADA frequently participate as *amici* in cases addressing federal regulation of motor vehicles. *See, e.g.*, Alliance Br., *Geier v. American Honda Motor Co.* (No. 98-1811). In doing so, they present the broad perspective of vehicle manufacturers and dealers.

This case raises issues of enormous importance to *amici* and their members. When the members of the Alliance and AIAM design and manufacture a vehicle, they need to be able to know what liability regime they face. Similarly, dealers and their customers are directly impacted by and benefit from a single, comprehensive federal regime governing the safety features and systems inherent in the design of the vehicles they sell and service. When there is no Federal Motor Vehicle Safety Standard ("FMVSS") on point, or when the relevant FMVSS represents only a minimum safety standard, manufacturers understand that state law may be relevant. But when NHTSA has carefully studied and directly addressed a particular design issue in a FMVSS, and that FMVSS expressly gives manufacturers multiple options for that specific design issue, manufacturers (and lower courts) have understood that federal law prevents juries from later deciding that a State's tort law made one of those options illusory. Especially since this Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), manufacturers have

understood an option expressly furnished by the expert federal agency to be a *real* option.

In reliance on that understanding, the members of the Alliance and AIAM have designed and manufactured, and the members of NADA have sold to consumers, millions of vehicles over multiple model years, while appellate courts across the Nation have uniformly upheld the understanding that federal options remain real options. Not only *amici*'s members but also the consumers who purchase their products benefit greatly from a regime in which manufacturers can rely on such careful, formal, explicit, comprehensive decisions about vehicle design by the expert regulatory agency.

INTRODUCTION AND SUMMARY OF ARGUMENT

This tort suit seeks to impose a rule that Type 2 seatbelts were required in the rear center and aisle seats of the vehicle at issue. That mandatory requirement, however, conflicts with FMVSS 208, the federal regulation that embodies NHTSA's deliberate, comprehensive, and carefully-calibrated judgment about this precise seatbelt design issue. NHTSA specifically focused on the question whether Type 2 seatbelts should be required in rear center and aisle seats, and NHTSA specifically rejected a mandatory requirement for Type 2 seatbelts. Instead, based on the policy factors that the Safety Act directs NHTSA to consider, the agency decided that Type 2 seatbelts should be required in *other* seating positions, but that Type 2

seatbelts should be optional in rear center and aisle seats. Because petitioners' tort suit would "produce a result inconsistent with" that federal judgment, it must be set aside under the Supremacy Clause. U.S. Br. 11 (quotation omitted).

Ten years ago, this Court considered an almost identical question: Whether a state tort suit claiming that airbags were required was preempted by a different provision of FMVSS 208 that authorized manufacturers to install one of several restraint devices. *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). This Court answered that question in the affirmative, holding that the tort suit was incompatible with the federal policy objectives embodied in FMVSS 208. *Id.*

Every federal and state appellate court to consider the question has concluded that this Court's decision in *Geier* governs cases like this one. And for good reason. The two cases involve similar provisions of the same regulation. They involve the same agency that went through the same formal process and carefully balanced the same statutory factors to arrive at the same result: a determination that federal objectives would best be served by giving manufacturers a choice. And both cases involve claims that a design option that NHTSA specifically decided to offer to manufacturers was a design defect under state law. But this case involves one factor that was not involved in *Geier*: a decade of lower court precedents reaffirming the validity of manufacturer reliance on *Geier* and confirming that the option given by FMVSS 208 was a meaningful one.

The government that failed to participate in any of these lower court decisions now comes in with a newly-minted position suggesting that *Geier* does not control. The government contends that this case is fundamentally unlike *Geier* because the agency, while expressly giving manufacturers an option, did not speak in terms of desiring a "mix" of the options it expressly authorized. U.S. Br. 9, 12. Preemption does not and should not turn on so flimsy a distinction. The government is not entitled to any special deference in interpreting *Geier* or the Supremacy Clause, and this case demonstrates the difficulty of giving the government's views any special weight. The government did not offer its idiosyncratic view while numerous lower court decisions taking a different view of *Geier* piled up.

The government asserts that the "the agency has spoken with a consistent voice for a lengthy period of time." U.S. Br. 29-30. In truth, the government stood mute on this issue while lower court precedents confirmed the view that a straightforward application of *Geier* called for preemption in this context. While the government stood silent, manufacturers designed and produced millions of vehicles in reliance on the analysis in *Geier*, the government's successful argument in that case, and the lower courts' consensus view that *Geier* applies fully to this neighboring provision of FMVSS 208. Deferring to a new government view that seizes on the presence or absence of explicit language referring to a "mix" of authorized options at this late date would turn *Geier* into an anomaly

and transform preemption doctrine into a trap for the unwary.

In the end, this case is indistinguishable from *Geier*. Rather than relegate *Geier* to obscurity as limited to the unusual cases where the agency not only allows flexibility but also expressly averts to the desirability of a mix, the Court should reaffirm *Geier* and the "ordinary pre-emption principles, grounded in longstanding precedent," that *Geier* applied. 529 U.S. at 874. Under those principles, a state-law rule that mandates what federal law expressly left optional would conflict with NHTSA's explicit and carefully considered judgment in FMVSS 208 that manufacturers should have the option to install Type 1 seatbelts in that seating position.

ARGUMENT

I. THIS CASE IS INDISTINGUISHABLE FROM AND GOVERNED BY *GEIER*.

A. *Geier* establishes the governing legal framework.

Petitioners urge this Court to adopt a "strong presumption against preemption" for claims under the Safety Act. Pet. Br. 21. The *Geier* Court, however, rejected just such a presumption and held that the Act's express preemption provision and its savings clause, taken together, codify "a neutral policy" that imposes no "special burden" on a party claiming conflict preemption. 529 U.S. at 870-71 (quotation omitted). The Constitution, moreover, contains its own presumption in favor of

preemption: the Supremacy Clause. U.S. Const. Art. VI, cl. 2. Congress enacts laws against the background of that Clause, and therefore "must be assumed to believe that federal law will prevail in any collision with state law." U.S. Br. 21, *Freightliner Corp. v. Myrick* (No. 94-286). And as this Court explained in *Geier*, ordinary conflict preemption principles reflect the common-sense point that "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict." 529 U.S. at 885. The government agrees that "ordinary" conflict preemption principles apply here and that this tort suit is preempted if it conflicts with a federal standard by "produc[ing] a result inconsistent with the objective of [the Safety Act], or, as in *Geier*, with the objective of an implementing regulation." U.S. Br. 11 (quotation omitted).

Geier not only clarified the framework for conflict preemption under the Safety Act, it decided substantially the same question as presented here: Whether FMVSS 208 preempts a state tort claim that a car is defective for failing to implement a particular type of restraint, even though NHTSA had carefully considered and rejected requiring that restraint in favor of a federal policy that provided manufacturers a choice.

The plaintiff in *Geier* alleged that her car's design was defective because it did not contain airbags. *Geier*, 529 U.S. at 865. That claim, as a matter of law, would have obligated manufacturers to install airbags in every vehicle during the relevant timeframe. NHTSA, however, had decided

after extensive study to implement a federal policy that "deliberately provided the manufacturer with a range of choices among different passive restraint devices." *Id.* at 875. This Court examined "[t]he history of FMVSS 208" to understand "why and how" NHTSA had arrived at FMVSS 208, *id.*, and the Court explained that NHTSA had balanced multiple, sometimes-competing policy considerations—such as lower costs, technical safety problems, encouraging technological development, and winning consumer acceptance—in order to maximize the overall safety gains. *See id.* at 877-81.

This Court also focused on the fact that, in promulgating FMVSS 208, NHTSA had carefully considered and firmly rejected "a proposed FMVSS 208 'all airbag' standard." *Id.* at 879. The agency instead decided that greater safety would be achieved by giving manufacturers "a range of choices among different passive restraint devices." *Id.* at 875. Plaintiffs' tort suit was preempted because it was premised on a state-law requirement to install an airbag, while NHTSA had opted for a deliberate federal policy of offering manufacturers the option to install a different passive restraint system instead of an airbag. A state tort suit that mandates what federal law expressly made optional and renders the federal option illusory clearly frustrates the federal regime.

B. FMVSS 208 expresses a deliberate policy choice to provide manufacturers with seatbelt design options.

The only difference between this case and *Geier* is the superficial one that this case involves options for manual seatbelts and *Geier* involved passive restraints. Although the specific design issue differs, the preemption analysis does not. NHTSA's treatment of the seatbelt design issue in this case tracks its treatment of the passive restraint issue in every material respect. In *Geier*, this Court relied on the facts that NHTSA had (1) carefully considered the precise question that the state tort suit sought to litigate; (2) specifically rejected the design requirement that the tort suit sought to impose; (3) conscientiously considered and balanced the policy factors relevant under the Act; and (4) implemented a comprehensive federal policy that deliberately gave manufacturers a choice. *See* 529 U.S. at 875-81.

The same is true here. NHTSA (1) carefully considered whether to require Type 2 seatbelts in the seating position at issue here; (2) specifically (and repeatedly) rejected proposals to do so; (3) conscientiously addressed the same statutorily mandated mix of policy objectives of safety, cost, and technological feasibility; and (4) arrived at a comprehensive regulation that required Type 2 seatbelts in other seating positions but decided instead to give manufacturers a choice in this seating position. The very same process and rationale that led NHTSA to reject an all-airbag

standard led it to reject an all-Type-2-seatbelt standard in 1989. No less than in *Geier*, that process and rationale require the conclusion that a state tort suit attempting to mandate the design requirement rejected by the agency cannot proceed.

1. NHTSA carefully considered the precise issue that this tort suit seeks to litigate.

NHTSA devoted its full and careful attention to the question whether Type 2 seatbelts should be required in rear center and aisle seats. Neither petitioners nor the government takes issue with this point, and the record leaves no room for dispute that NHTSA focused directly on this issue and did so in multiple rulemakings spanning many years.

In the 1980s, NHTSA considered (and categorically denied) numerous requests that the agency mandate Type 2 seatbelts in rear center and aisle seats. First, the agency denied such a petition in 1984. *See* 49 Fed. Reg. 15241, 15241-42 (Apr. 18, 1984) (denying petition to "require the installation of Type 2 safety belts . . . in the rear outboard seating positions of passenger cars" because Type 2 belts did not "offer[] the maximum possible protection for children"). Then, in 1987, NHTSA granted a petition to "reexamine" whether "the installation of [Type 2] belts in rear seats" should be required. 52 Fed. Reg. 22848 (June 16, 1987); 53 Fed. Reg. 47982, 47983 (Nov. 29, 1988). The agency's "reexamination" of the seat belt issue was thorough, spanning four years (from 1987-1991), involving over a hundred comments, and resulting

in a "detail[ed]" agency analysis of the costs and safety benefits of rear seatbelts. 53 Fed. Reg. at 47983.

In particular, the 1989 amendments to FMVSS 208 reflect the thoroughness of the agency's rulemaking process. After granting the 1987 petition to reconsider its stance on rear seatbelts, NHTSA published an advance notice of proposed rulemaking (ANPRM), explaining that the agency was considering requiring Type 2 seatbelts in some rear seats and requesting comments regarding the agency's "concern[]" that the "costs [of Type 2 seatbelts in rear center seats] are extremely disproportionate to the safety benefits." 52 Fed. Reg. at 22849. In response to the ANPRM, 34 comments were received and "carefully considered" in developing a November 1988 Notice of Proposed Rulemaking (NPRM). 53 Fed. Reg. at 47983. The NPRM explained that NHTSA had tentatively determined that Type 2 belts should be required in rear outboard seating positions only. Seventy additional comments were then considered leading to NHTSA's promulgation of a final rule in June 1989 that required Type 2 seatbelts in rear outboard seating positions, but continued to give manufacturers the choice to install either a "Type 1 or Type 2 seat belt assembly" in rear center and aisle seating positions. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967).

The agency's conscientious and thorough consideration of the precise issue that the state claim here implicates puts this case on all fours

with *Geier* and stands in stark contrast to the absence of focused agency attention in *Wyeth v. Levine*, 555 U.S. ___, 129 S. Ct. 1187 (2009).

Both the *Wyeth* majority and the dissent made clear that whether FDA had focused on the adequacy of Phenergan's warning concerning "IV-push" was of great importance. The Court approved the state court's finding that FDA gave no more than "passing attention to the issue of IV-push." *Id.* at 1199 (internal quotation marks omitted); *see also id.* at 1203 n.14 ("As we have discussed, the FDA did not consider and reject a stronger warning against IV-push injection of Phenergan."). The dissent, in contrast, read the record as showing that "the FDA specifically considered and reconsidered the strength of Phenergan's IV-push-related warnings in light of new scientific and medical data." *Id.* at 1222 (Alito, J., joined by Roberts, C.J., and Scalia, J., dissenting).[3]

Moreover, the opinions in *Wyeth* make clear that FDA's specific focus (or lack thereof) on the issue presented in the tort suit was central to the distinguishability of *Geier*. Wyeth argued that this "case resemble[d] *Geier* because the FDA

[3] The Court's description of the pre-emption argument it was rejecting further underscores the centrality of this debate over whether FDA had focused on the issue presented by the tort claim. "Once the FDA has approved a drug's label," the argument went, "a state-law verdict may not deem the label inadequate *regardless of whether there is any evidence that the FDA has considered the stronger warning at issue*." *Id.* at 1202 (emphasis added).

determined that no additional warning on IV-push administration was needed," but the majority dismissed that argument as "belied by the record." *Id.* at 1203 n.14. The dissent argued that the majority was misreading the record "[i]n its attempt to evade *Geier*'s applicability to this case," because "it is demonstrably untrue that the FDA failed to consider (and strike a 'balance' between) the specific costs and benefits associated with IV push." *Id.* at 1222.[1]

2. NHTSA rejected the very design requirement that this tort suit seeks to impose.

The government acknowledges that "NHTSA's determination not to require Type 2 seatbelts was reached through careful consideration and based on sound reasons," U.S. Br. 19, but argues that that determination is irrelevant because the agency did not "reject" an all Type-2 standard. U.S. Br. 19-20. That revisionist view of history does not withstand scrutiny.

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[1] The *Wyeth* majority also deemed it significant that FDA had staked out a pro-preemption position in a less formal way contrasting NHTSA's formal rulemaking at issue in *Geier* with FDA's "mere assertion" of a conflict. *Id.* at 1201; *see also id.* at 1203. And Justice Breyer "w[r]ote separately to emphasize the Court's statement that 'we have no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law.'" *Id.* at 1204 (Breyer, J., concurring). The extensive record of formal rulemakings by NHTSA — in large part the same administrative process at issue in *Geier* — yet again confirms that *Wyeth* is entirely distinguishable.

During the 1980s, NHTSA time and again rejected proposals to require Type 2 seatbelts in rear center and aisle seats. In 1984, NHTSA denied a petition to require Type 2 seatbelts in rear seats, finding that they were not the safest option for children and could discourage the use of child safety seats. 49 Fed. Reg. at 15241-42. In its 1988 NPRM, NHTSA proposed to exclude center seats from a Type-2 mandate because of "technological difficulties" and its forecast of "small safety benefits and substantially greater costs." 53 Fed. Reg. at 17984. NHTSA adhered to its rejection of an all-Type-2 mandate in its 1989 final rule, finding that proponents had not proffered any "new data that would cause the agency to change its tentative conclusion." 54 Fed. Reg. at 46258. The agency, moreover, clarified that safety and design problems posed by Type 2 belts in rear *aisle* seats had led it specifically to reject proposals to require Type 2 seatbelts in that seating position. *Id.* at 46258.

The government also argues that the key distinction between this case and *Geier* is that, in *Geier*, NHTSA rejected an all-airbags-right-away standard. U.S. Br. 10. That is no distinction at all. The agency's decision-making process is indistinguishable: In both rules, the agency encouraged early installation of one technology, even while expressly permitting manufacturers to opt for a different technology. *Geier* acknowledged that NHTSA had not "guarantee[d]" any "mix" of devices; the rule did not forbid installing more airbags, or doing so sooner, than the agency had required. 529 U.S. at 879. To the contrary, the rule "provided a form of *extra credit* for airbag

installation." *Id.* (emphasis added). Thus, the fact that NHTSA "encourage[d]" manufacturers to design and install Type 2 seatbelts *if* they could do so "without interfering with the aisleway's purpose of allowing access," 54 Fed. Reg. at 46258, only makes this case more like *Geier*. *See* 529 U.S. at 879. Indeed, NHTSA's qualified encouragement here is a lesser incentive than the "extra credit" in *Geier*.

In sum, it is just as clear in this case as in *Geier* that NHTSA not only directly considered but also firmly and specifically rejected the rule that this tort suit seeks to impose.

3. NHTSA's decision was based on the policy considerations required by the Safety Act.

It is equally obvious from NHTSA's contemporaneous explanations of FMVSS 208 that its decision to give manufacturers a choice between Type 1 and Type 2 seatbelts for rear aisle seats was policy-driven. Like the agency decision at issue in *Geier*, NHTSA's decision here was based on the multifaceted policy considerations contemplated by the Act, including technological constraints and cost as well as safety.

At the outset, petitioners and the government argue that cost and technological constraints are inappropriate factors and that NHTSA's reliance on them cannot support preemption. Pet. Br. 42; U.S. Br. 29. But that costs-are-irrelevant approach ignores both common sense and the reality that the agency is statutorily *obligated* to consider cost and

technology. 49 U.S.C. § 30111(b)(3) (directing DOT to consider "whether a proposed standard is reasonable, practicable, and appropriate"); H.R. Rep. No. 89-1776, at 16 (1966) ("practicality" compels DOT to consider "technological ability to achieve the goal of a particular standard as well as ... economic factors"). Under the Safety Act, cost-benefit considerations are every bit as legitimate as "pure" safety considerations — which is not surprising given that cost and safety are inherently related in this context. *Cf. Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. ___, 129 S. Ct. 1498 (2009). The Safety Act, after all, governs vehicles driven by real consumers. Not all consumers can afford the newest model or the safest design theoretically available. Safety mandates that increase the cost of newer cars can lead some consumers to keep older, less-safe cars for a longer time, which actually undermines safety. *See Geier*, 529 U.S. at 878.[5] Reason, as well as the Act, obligates NHTSA also to consider the opportunity costs of potential safety measures: "[R]equiring significant industry and agency resources to be spent for relatively little safety gain can result in a lost opportunity to better improve vehicle safety through other means . . . ." 52 Fed. Reg. at 22819.

[5] The government elides this important point in this brief by suggesting that the relevant question is whether passengers would be more likely to buckle up a Type 2 or a Type 1 belt. U.S. Br. 24. That question does not arise if a new safety mandate raises the cost of new vehicles and leads consumers to keep older vehicles with Type 1 belts at multiple seat locations and without other safety enhancements.

This Court recognized the link between cost and safety in *Geier*, concluding that FMVSS 208 "would . . . lower costs . . . which would promote FMVSS 208's safety objectives." 529 U.S. at 875. The government recognized this link in *Geier* too, arguing that this Court should consider the agency's cost-benefit analysis in determining whether the federal policy resulting from that analysis preempted state tort law. U.S. *Geier* Br. 4-5. The government was correct then. *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983) ("The agency is correct to look at the costs as well as the benefits of Standard 208.").

With respect to the statutorily-mandated considerations of cost and technological constraints, NHTSA explained that "there [were] more technical difficulties associated with any requirement for [Type 2] belts at center rear seating positions, and that [Type 2] belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." 54 Fed. Reg. at 46258. Similarly, the agency concluded that Type 2 belts should not be required in rear aisle positions because of safety and design concerns that the shoulder harness would stretch "across the aisleway" and "cause entry and exit problems for occupants." 54 Fed. Reg. at 46258; 55 Fed. Reg. 30944, 30945 (July 30, 1990). While vehicle modifications may have been possible, the agency decided that forcing such modifications would be unwarranted because they would require structural changes to the roof and "impose

disproportionately high costs." 54 Fed. Reg. at 16258.

Safety concerns also contributed to NHTSA's decision that Type 2 belts should not be required in rear center and aisle seats. Child safety was the primary reason the agency rejected a Type 2 seatbelt requirement in 1984 for all rear seats. 53 Fed. Reg. at 17982. And NHTSA continued to consider the difficulties that inhere in designing seatbelts that tightly secure child seats and also safely restrain older children, teenagers, and adults. *See, e.g.*, 53 Fed. Reg. at 17982 (describing 1984 decision as "focused primarily on the child safety issues" and noting that permitting Type 1 belts in rear center seats "would offer greater protection to children than [a rule] requiring lap/shoulder belts"); 58 Fed. Reg. 46928, 46929 (Sept. 3, 1993) (permitting, for the first time, testing of child seats with shoulder belts); 64 Fed. Reg. 10786, 10788 (Mar. 5, 1999).

To the extent the government suggests that this case is different from *Geier* because NHTSA would have been happy if all manufacturers immediately adopted Type 2 belts in rear aisle and center seats, U.S. Br. 10, the agency's contemporaneous explanations of its decisions in and leading up to FMVSS 208 tell a different story. That history is the one that controls.

4. NHTSA established a comprehensive federal policy.

The government retrospectively characterizes FMVSS 208 as nothing more than a "minimum

standard" that did not undertake to consider whether additional requirements were appropriate. U.S. Br. 18-19. As in *Geier*, however, NHTSA's contemporaneous explanation "make[s] clear that the standard deliberately provided the manufacturer with a range of choices." *See* 529 U.S. at 875. FMVSS 208 expresses NHTSA's deliberate policy decision to provide a choice between a Type 1 and Type 2 seatbelt in certain seating positions (but not in others). That "free[dom] to choose among those options," U.S. Br. 8, was an important piece of the regulatory framework. In 1994, after the vehicle in this case was manufactured, NHTSA's Chief Counsel explained why: "We believe the vehicle manufacturer is in the best position to balance, for its vehicles, the benefits associated with [the] extra protection [afforded by Type 2 belts] against any difficulties related to occupants entering and exiting the vehicle." Letter from Philip R. Recht, NHTSA Chief Counsel, to Roger Matoba (Dec. 28, 1994) ("Recht letter").

Petitioners and the government claim that this case is like *Spriestma v. Mercury Marine*, 537 U.S. 51 (2002), but they are mistaken. Pet. Br. 42-43; U.S. Br. 23-24. As the Court explained in that case, the Coast Guard's "decision *not* to impose a [particular] requirement," when considered in its proper historical and regulatory context, was not "an affirmative policy judgment" intended to be "authoritative." 537 U.S. at 67 (quotation marks omitted). Rather than deciding *how* the issue of propeller guards should be resolved, the Coast Guard merely decided "not to regulate [that]

particular aspect of boating safety." *Id.* at 65. Precisely because propeller guards were "an area not yet subject to federal regulation," it did not frustrate the federal regulatory scheme for States to regulate them. *Id.* at 66.

This case could not be more different. NHTSA did not "fail[] to regulate" seatbelts. U.S. Br. 19, *Sprietsma* (No. 07-106). NHTSA did not consider only part of the universe of seatbelt design in passenger cars and defer other parts, including the issue in this case, pending further study. NHTSA did not "decide not to decide" the issue or suggest that its resolution was provisional or less than authoritative. To the contrary, the agency made "an affirmative 'policy judgment,'" *Sprietsma*, 537 U.S. at 67, that the federal statutory policies regarding seatbelts would best be served by preserving manufacturer choice as to rear center and aisle seats (but only as to those seats). And NHTSA's Chief Counsel subsequently explained that the agency expressly left that choice to manufacturers, not the States, because manufacturers were in the best position to balance the extra protection that Type 2 belts could provide with the entry and exit obstacles they posed. The *Sprietsma* Court's explanation of why that case was nothing like *Geier* confirms that this case is indistinguishable from *Geier* and nothing like *Sprietsma*: the Coast Guard's decision to "take no regulatory action" stands in "sharp contrast" to NHTSA's decision that allowed manufacturers to install "*alternative* protection systems . . . rather than one particular system in every car." 537 U.S. at 65, 67 (emphasis in original).

C. The federal and state courts of appeals are unanimous that *Geier* mandates preemption of tort suits like this one.

For the reasons set out above, *amici* submit that this case is indistinguishable from *Geier*. Numerous federal and state appellate courts across the Nation have confronted this question, and literally every one of them has agreed. None has found that NHTSA's decision to give manufacturers a choice between Type 1 and Type 2 seatbelts in rear center and aisle seats was anything less than a deliberate decision reflecting federal policy objectives and forming part of a comprehensive federal regulatory scheme. *See, e.g.*, Pet App 12a-18a (decision below); *Carden v. Gen. Motors Corp.*, 509 F.3d 227, 230-31 (5th Cir. 2007); *Griffith v. Gen. Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 383 (7th Cir. 2000) (D. Wood, J.); *Roland v. Gen. Motors*, 881 N.E.2d 722, 728-29 (Ind. App. 2008); *Hemmelgarn v. Volvo Car Corp.*, 809 N.E.2d 1091 (Mass. App. 2004).

These courts have faithfully followed *Geier*'s analytical approach, parsing the regulatory history of FMVSS 208 and concluding without exception that FMVSS 208 implements "a comprehensive regulatory scheme," not a minimum safety standard. Pet App 20a. This Court, unlike those lower courts, is free to overrule *Geier* or limit it to its facts. However, *Geier* was correct when it was decided and is materially indistinguishable from this case. Indeed, as explained next, the only

relevant consideration that differentiates this case from *Geier* is the decade of reasonable reliance by manufacturers on *Geier* and its principles.

II. THE EXTENSIVE RELIANCE ON THE CONSENSUS UNDERSTANDING OF *GEIER* UNDERSCORES THAT PREEMPTION IS APPROPRIATE.

In the decade since *Geier* was decided, manufacturers have consistently relied on *Geier* and the preemption principles it announced. *Geier* confirmed that when federal law gives manufacturers an option among safety devices, the federal option is a real one. Under *Geier*, manufacturers would not find out years later, after design decisions have been made and millions of vehicles have left showrooms, that the federal option was illusory. The need for clear and understandable rules of preemption cannot be overstated. The question a manufacturer confronts before it produces a car is a practical one: "Do we need to install an airbag and Type 2 seatbelts in rear center and aisle seats?" *Geier* seemingly supplied a clear answer: "No federal law gives you a choice." The clarity of that answer was then confirmed by numerous lower court decisions. Even lower courts that disliked the *Geier* framework recognized that *Geier* controlled this issue. *See Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 91 (W. Va. 2009). It is too late in the day to render both the clarity of *Geier* and the option provided by federal law illusory. But that is precisely what the government and petitioners advocate.

In none of that extensive lower court litigation did the government ever suggest that *Geier* was not controlling. And as the pro-preemption precedent piled up, the government never breathed a word to suggest that *everyone* was misreading *Geier*, instead standing mute even through multiple appeals and petitions for *certiorari* in this Court. Thus, manufacturers relied not only on *Geier* and the lower courts' application of *Geier* to this issue, but also on the government's own silence.

Not only did the Department of Justice remain on the sidelines, but NHTSA also did nothing to suggest that *Geier* was inapposite or that the myriad lower court decisions applying it to find preemption in cases like this one misunderstood the agency's decisions. NHTSA could have made clear initially that it stopped short of mandating type 2 seat belts at all positions only because it wanted to gather more information before making a decision as to a particular issue or because it wanted to leave the States free to go further. The agency, however, said nothing of the sort in its explanations of the decisions at issue here. And once lower courts began to treat the issue here as controlled by *Geier*, NHTSA could have clarified that its regulatory actions were being misunderstood. To be sure, a post-hoc attempt to recharacterize its earlier decisions or to stake out a different position on preemption might itself have been suspect, *see Wyeth*, 129 S. Ct. at 1201 n.3, but NHTSA did not even offer even that. Until this Court called for the views of the Solicitor General in this case, NHTSA never did or said anything, with any degree of formality or persuasiveness, to

suggest that the courts all were misapplying *Geier* and misunderstanding NHTSA's own actions. If indeed it was NHTSA's view that preemption was inappropriate in cases like this, that view was a well-kept secret.

Nor were manufacturers the only interested parties to rely. Congress too has understandably relied on *Geier* and the consensus understanding of *Geier* exemplified by the decision below. Congress has never suggested that the *Geier* Court misinterpreted the Safety Act's preemptive reach. It has not sought to change the Act's provisions that bear on the preemption issue or otherwise to abrogate or limit the effect of *Geier*'s holding. In enacting Anton's Law, Congress chose to leave the preemption framework untouched and simply exercised its prerogative to resolve a particular vehicle safety issue itself rather than delegate its resolution to the agency. *See* 69 Fed. Reg. 70901, 70904-06 (Dec. 8, 2004).

The government now asks this Court to frustrate all that reasonable reliance by limiting *Geier* in a wholly unanticipated manner. For the very same FMVSS as in *Geier*, and for a rule developed by the same process as in *Geier*, the government suggests that the choice given to manufacturers was illusory because NHTSA did not express a specific desire for a "mix" of Type 1 and Type 2 seatbelts in rear aisle seats. That supposed distinction does not withstand scrutiny, *see infra* at 27-29, and eluded every appellate court to consider the issue.

But more important, that is far too flimsy and novel a distinction to justify pulling the rug out from an entire industry's years of reasonable reliance on what everyone understood *Geier* to mean. Preemption is an important part of our federal constitutional framework. The rules need to be predictable and stable enough for regulated entities to rely on them at the time they engage in the primary conduct that federal law regulates. It is too late now for manufacturers to revisit design decisions they made based on a deliberate federal decision to allow an option for certain seating positions, but not others. Preemption rules that do not provide clear guidance or that turn on government positions not announced until a decade after the relevant regulatory and design decisions will frustrate federal objectives. In the absence of clear rules, regulated parties will not be able to rely on federal rules seemingly allowing options even when the federal agency affirmatively wants there to be meaningful federal options. The Court should decline the invitation to transform the clear framework of *Geier* into a trap for the unwary.

III. THE GOVERNMENT IS NOT ENTITLED TO DEFERENCE.

This case is governed by *Geier*. Needless to say, the Court does not owe anyone deference in interpreting its own decision. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336-37 n.5 (2000). To be sure, in some past preemption cases, where the relevant agency has been consistent and persuasive in explaining its actions and how the regulatory regime that it administers works in

practice, the Court has looked to that explanation to aid in its understanding of the legal question whether a state-law claim frustrates the federal regime. But the Court has never suggested that an agency, or the Solicitor General, is entitled to any deference on that legal question. *Wyeth*, 129 S. Ct. at 1201 ("[W]e have not deferred to an agency's *conclusion* that state law is pre-empted. Rather, we have attended to an agency's explanation of how state law affects the regulatory scheme.") (emphasis in original).

The government's position in this case should be viewed with skepticism in any event. For a decade, while appellate court decisions unanimously holding that FMVSS 208 preempts claims like this one piled up, the government never articulated a contrary view. Even when the new Administration issued an Executive Order on Preemption, 74 Fed. Reg. 24693 (May 22, 2009), that was intended on its face to mark a break from the previous approach to preemption, NHTSA still failed to give any hint that it disagreed with the courts' consensus interpretation of *Geier* and its own actions.

The extensive reliance on the consensus understanding of *Geier* discussed above makes it even more inappropriate to give special deference to the government's newly announced position. It would be one thing if the government had been participating in these cases over the years and had staked out a clear and consistent position. But it makes no sense to have a regime where the Solicitor General's brief is treated as the key input when that input comes long after numerous courts

across the Nation have held that seatbelt claims like petitioners' were preempted under the rationale of *Geier* and many model years after the relevant practical decisions to rely on the government's regulatory decision have been made.

In short, as best anyone in the regulated community can tell, this too is a case, like *Wyeth*, where the position taken in the government's brief "departs markedly from the [agency's] understanding at all times relevant to this case." *Wyeth*, 129 S. Ct. at 1203 n.13. That is all the more reason why the Court should discount the government's belated take on NHTSA's actions in favor of focusing on what the agency actually did and said in issuing the standards at issue.

2. The government argues that this Court should defer to its position because "the agency has spoken with a consistent voice for a lengthy period of time." U.S. Br. 29-30. But the one thing the government clearly has *not* done is speak with any voice, let alone with a consistent one, on the issue here. Indeed, the only thing consistent about the government's past position on the issue here is its failure to weigh in as the precedents applying *Geier* have accumulated.

In its effort to show that it has staked out a "consistent" position, the government addresses a straw man: the broad argument that any regulation that affords a choice preempts state tort suits. *See* U.S. Br. 30-31. That the government has consistently stated that "the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint

systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted," U.S. Br. 30 (quoting U.S. Br. 15, *Wood v. General Motors Corp.* (No. 89-16)), is irrelevant. The question here is whether the standard at issue "mere[ly]" means that manufacturers could comply with federal law by installing either a Type 1 or a Type 2 seatbelt, or whether — as in *Geier* — the standard reflects a federal policy judgment that manufacturers should have an affirmative, meaningful option. The government has been equally consistent in arguing that the latter type of standard preempts contrary state tort rules, *see* U.S. *Geier* Br. 23-26, at least until this case.

Retreating to the broad proposition that a failure to require a particular technology, "without more," does not preempt tort suits, U.S. Br. 13, 29, does not answer the question whether the standard here merely failed to require Type 2 seatbelts (in the minimalist sense that the Coast Guard failed to require a propeller guard in *Sprietsma*), or whether, as in *Geier*, the agency reached a careful policy judgment that either of two options was appropriate and should be authorized. NHTSA's contemporaneous statements establish that the agency established a deliberate, well-considered federal policy that was intended to leave manufacturers free to choose between the authorized options. *See supra* at 14-18. The government would not get deference if it openly adopted a new position in this litigation that was contrary to the agency's contemporaneous statements. *Cf. Wyeth*, 129 S. Ct. at 1201 ("The

FDA's 2006 position plainly does not reflect the agency's own view at all times relevant to this litigation."). It should fare no better for its effort to skirt the key issue by claiming consistency at an irrelevant level of generality.

3. Some of petitioners' *amici* are candid about wanting this Court to overrule *Geier* or relegate it to obscurity by limiting it to its specific facts. *See, e.g.*, State of Illinois Br. 25. Although the government purports to reaffirm *Geier* and its position in *Geier*, there should be no mistake: Accepting the government's submission here would have the very same effect. If the government's current position is correct, *Geier* is a highly idiosyncratic decision with remarkably little real-world relevance. Regulatory agencies do not frequently have occasion to speak in express terms of desiring a "mix" of approaches to an issue. Generally, what agencies want in conferring options is a degree of flexibility for the regulated community. It will be the rare case where the agency affirmatively desires not just flexibility but that the regulated community exercise that flexibility in a manner that achieves a pre-ordained "mix." Nor, until the government's brief in this case, did regulatory agencies (or regulated entities and individuals) have any reason to believe it was critical whether an agency used such language. To limit *Geier* to cases where the agency happens to have used such language would be to consign it to oblivion.

Certainly none of the Members of this Court has understood *Geier* to be an insignificant decision

limited to quirky facts. The dissenters in *Geier* accused the majority of doing much more than issuing a fact-bound decision that would have no broader application. *See Geier*, 529 U.S. at 886-913 (Stevens, J., joined by Souter, J., Thomas, J., and Ginsburg, J., dissenting). And *Geier* has figured prominently in the Court's more recent preemption cases. *See, e.g., Wyeth*, 129 S. Ct. at 1200-01, 1203; *id.* at 1220-22, 1227-29 (Alito, J., joined by Roberts, C.J., and Scalia, J., dissenting); *Sprietsma*, 537 U.S. at 65-68.

It would be inconsistent with *Geier* and the traditional Supremacy Clause principles that it applied to make preemption turn on whether an agency spoke in terms of a "mix." Under the Safety Act, and under the Supremacy Clause more generally, what matters is whether a state-law claim would frustrate the federal regulator's purposes. Such frustration can occur just as readily when federal regulators' purpose is to confer meaningful flexibility as when the purpose is to achieve a particular "mix." Indeed, the government appears to recognize as much in other contexts in which it has concluded that state efforts to mandate what federal law encourages but leaves voluntary frustrate the federal objective. *See* U.S. Br. 33-34, *Chamber of Commerce v. Whiting* (No. 09-115) (citing, *inter alia*, *Geier*).

Where an agency has carefully considered and specifically rejected the precise rule sought by a state tort suit, it stands to reason that the suit often will present an obstacle to the "accomplishment . . . of the full purpose and

objectives" of the federal regime. *Hines*, 312 U.S. at 67. To be sure, if the agency does not reject the tort-suit rule on its merits but rather postpones its decision on the issue pending further study, or declines to extend federal regulation to a new area, then the nature of the agency's decision or the regulatory context may make clear that the agency in effect left the issue open for the States and a state tort suit would not frustrate the federal scheme.

But FMVSS 208 cannot be written off as a decision not to decide or a decision to ensure flexibility for state law regulation. NHTSA carefully considered whether Type 2 seatbelts should be required in rear center and aisle seats as well as in other seating positions; it specifically resolved that issue in a formal and clear manner; it decided to affirmatively permit manufacturers to choose a Type 1 or Type 2 seat belt assembly in those seating positions (unlike in most other seating positions), 54 Fed. Reg. at 46258; and in doing so it relied on the same statutory policy factors of technological feasibility, safety, and cost as in *Geier*. As Judge Wood explained, it is "hard to see any significant difference between the two [regulatory actions]." *Hurley*, 222 F.3d at 381, and there is no basis for a different result in this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeal.

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Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*,
Respondents.

On Writ Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice ["AAJ"], respectfully submits this brief as *amicus curiae*. The parties have filed letters of consent to the filing of amicus briefs.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits and personal injury actions, including those injured in automobile accidents as a result of dangerously designed vehicles. Throughout its 65-year history, the association has championed the fundamental right of every American to legal recourse for redress of wrongful injury. The lower court's decision in this case undermines this fundamental right.

Increasingly, as in this case, defendants in state tort actions seek immunity from state tort liability by invoking the doctrine of federal preemption. In too many instances, because federal safety regulation does not provide a private right of action, immunity from liability under state law deprives injured persons of any remedy at all.

AAJ views the decision below as an unwarranted denial of Americans' fundamental right to legal recourse for injury, based on little more than the court's interpretation of congressional silence or ambiguity.

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[1] Pursuant to Rule 37.6, *Amicus Curiae* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or counsel make a monetary contribution to its preparation.

SUMMARY OF THE ARGUMENT

1. The scope of preemption of state law by federal health and safety regulation has expanded due to efforts by business interests to use federal regulation as a shield against accountability under state tort law.

This case involves the death of a woman due to use of a seatbelt that was not reasonably safe in the event of an automobile crash. The lower court set aside the plaintiffs' state law cause of action for damages caused by unreasonably dangerous products. The court, relying on this Court's precedents, held that requiring automakers to compensate those they have wrongfully harmed "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the National Traffic and Motor Vehicle Safety Act.

The recent use of "obstacle" preemption to eliminate Americans' common law remedies for wrongful deaths and injuries expands the doctrine of preemption far beyond its constitutional foundation. The Founders designed the Supremacy Clause not to expand the powers of the Congress, but to direct judges to apply federal law regardless of conflicting state law. Consequently, preemption analysis requires an objective process of statutory construction on the part of a court. "Obstacle" preemption, properly applied to state laws that render it impossible for federal law to accomplish Congress's purposes, similarly requires a narrow and objective analysis.

The expanded "obstacle" preemption applied by the court below focuses on the court's subjective determination of congressional purposes and on speculative, rather than actual conflict. This opens the door to judicial policymaking.

2. State tort remedies for wrongful death and injury do not, in fact, conflict with federal safety regulation. Government regulation consists of mandatory requirements imposed upon private actors, such as automakers. A verdict in a product liability action imposes no requirement other than to compensate the injured plaintiff.

A verdict for plaintiffs in this case would not require the jury in a future similar case to return the same verdict. A verdict for plaintiffs may have an indirect regulatory impact in that a manufacturer may perceive a financial incentive to avoid similar outcomes in future cases by altering the design of his product. The manufacturer may adopt a different design. The manufacturer might rationally decide, considering the likelihood and severity of possible future harm, to compensate any future plaintiff. The critical feature is that potential liability is merely a financial incentive; the decision regarding product design remains with the private actor. Preemption is concerned with the exercise of governmental power, not governmental persuasion.

Broad preemption of state tort remedies would leave Americans entirely dependent upon federal administrative agencies to ensure product safety. Such agencies can bring valuable expertise to bear on safety issues, but they are not infallible. Many products have found their way to the marketplace

and have caused death and serious injury, despite compliance with applicable federal safety regulation.

In addition, tort liability actions often uncover information about product dangers that was not available to regulators prior to marketing. For this reason, liability actions and regulation have long been viewed as complementary efforts to protect the safety of the American public.

In this case, the Court need not speculate whether Congress intended tort remedies to coexist with the motor vehicle safety standards issued by NHTSA. The Safety Act explicitly provides that such regulations are "minimum" safety standards.

3. Expansive "obstacle" preemption of state tort remedies impinges upon the fundamental right of all Americans to legal remedy for wrongful injury. That right is grounded in the guarantee of due process and precludes the elimination of common law remedies for invasion of certain "absolute" rights without provision of an alternative substitute remedy. Congress has the ability to explicitly displace common law remedies where it so intends. Given the great importance of the right to seek legal recourse for injury, it cannot be assumed that Congress would have intended, impliedly and silently, to leave injured persons bereft of all remedy.

ARGUMENT

I. COMMON LAW TORT REMEDIES DO NOT PRESENT AN "OBSTACLE" TO THE CONGRESSIONAL PURPOSE OF SAFETY LEGISLATION.

A. Obstacle Preemption Has Become Unduly Expansive at the Behest of Corporate Interests Seeking Immunity from Accountability Under State Law for Causing Wrongful Injury and Death.

The law of preemption has in recent years become a battleground. The present case is part of a concerted and protracted effort by some business interests to escape accountability for tortious conduct resulting in injury or death. "With increasing frequency, corporations have attempted to turn [federal health and safety] statutes from regulatory swords into private shields, contending that the federal statutes preempt the recovery of damages under state tort law." Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*; 77 B.U.L. Rev. 559, 561 (1997). *See also*, Cindy Skrzycki, *The Chamber Reached a Sticking Point*, Wash. Post, Sept. 17, 1999, at E1 (describing efforts by the nation's largest business lobbying group to defeat legislation that would have curtailed the preemptive effect of federal statutes and regulations).

Many observers have viewed these efforts as an attack on the right of ordinary Americans to access to the courts for legal redress. State attorneys general, state legislatures, bar associations,

consumer advocacy groups and others have denounced the preemption of state tort remedies without explicit congressional authorization as "stealth tort reform" and a "sneak attack" on individual rights. Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227, 255-56 (2007).

Despite this Court's repeated admonition that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), Americans' state tort remedies are often set aside. *See* Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 Sup. Ct. Econ. Rev. 43, 52 (2006) (During 1986 to 2004, of thirty-two cases involving preemption of state common-law tort claims; the Court found preemption in 62.5%.).

This case involves the most controversial expansion of preemption doctrine setting aside Americans' traditional common law remedies for wrongful injury, based on judicial determination that requiring wrongdoers to compensate those they have harmed "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The court below found that such "obstacle" preemption bars plaintiffs' state law causes of action in this case. *Williamson v. Mazda Motor of Am., Inc.*, 84 Cal. Rptr. 3d 545, 552 (2008).

Geier was the first case in which this Court applied "obstacle" preemption to state tort remedies for personal injury. The four dissenting Justices criticized "the Court's unprecedented extension of the doctrine of pre-emption" 529 U.S. at 886 (Stevens, J., dissenting), and warned against this "potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes." *Id.* at 907. Amicus suggests that this case offers an appropriate vehicle for the Court to set clear and narrow limits on "obstacle" preemption.

B. "Obstacle" Preemption Is Properly Restricted to Setting Aside State Laws That Would Actually Render the Achievement of the Purpose of Federal Law Impossible.

The Founders did not view federal preemption of state law as a problem, but as a solution. In our system of dual sovereignty, many activities are governed by national and state law concurrently, presenting courts with the choice of which law controls. The Constitution provides their answer. The doctrine of federal preemption of state law "has its roots in the Supremacy Clause." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982); *see also Wyeth v. Levine*, 129 S.Ct. 1187, 1205-07 (2009); *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008).

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall

> be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Constitutional Convention adopted the Supremacy Clause in its present form by unanimous consent after defeating a competing provision that would have given Congress the power to "negative" state laws. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2089-90 (2000) (summarizing the proceedings). The history as well as the plain text indicate that the Founders intended the Supremacy Clause for a limited purpose, "not as the repository of Congress's power to preempt state laws, but as a constitutional rule to resolve conflicts between state and federal laws." *Id.*

Thus, as Professor Nelson convincingly demonstrates, the Founders provided for preemption of state laws where there is actual—not merely potential or speculative—conflict. "Under the Supremacy Clause, then, the test for preemption is simple: Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 260 (2000). The essential feature of "obstacle" preemption, asking not whether state law contradicts the provisions of federal law but whether it frustrates the "full purposes and objectives of Congress," is not supported by the constitutional text of the Supremacy Clause.

As this Court has often stated, the intent of Congress "is the ultimate touchstone in every pre-emption case." *Wyeth*, 129 S.Ct. at 1194 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. at 485). In many circumstances, the inquiry is clearly defined, even if not easily answered. Where Congress has included an express preemption provision, the court's task is one of statutory interpretation and it "need only identify the domain expressly pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); *Lohr*, at 484. A court may find "field" preemption where Congress legislates in an area where federal interest is dominant or enacts a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. at 153 (describing field preemption as a question of statutory construction).

Implied conflict preemption is similarly an objective matter of statutory construction that "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Perez v. Campbell*, 402 U.S. 637, 644 (1971). As the text of the Supremacy Clause indicates, where it is logically impossible for the court to apply both federal and state law, the court must apply federal law. Such an analysis leaves no room for a court to interpose its own subjective policy views.

Professor Nelson argues that the Supremacy Clause looks to whether federal and state laws

present a "logical-contradiction" such that a court "would have to choose between them." Nelson, *supra*, at 260. Chief Justice Marshall's articulation of the preemption doctrine in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), confirms that only those state laws that completely contradict federal law must yield. Nelson, *supra*, at 266-72.

Because implied conflict preemption is not grounded in the statutory text, it is important for courts to confine their analysis to identifying objective contradiction between state and federal laws. They should not decide on the basis of subjective considerations concerning unstated congressional purposes or their "full" measure. To hold otherwise, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). This Court has cautioned that, "courts should not assume the role which our system assigns to Congress." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 223 (1983). As the four dissenting justices in *Geier* more pointedly noted, "the Supremacy Clause does not give unelected federal judges carte blanche to use federal law as a means of imposing their own ideas of tort reform on the States." *Geier*, 529 U.S. at 894 (Stevens, J., dissenting).

"Obstacle" preemption poses just such a danger. This type of implied preemption was engrafted onto existing doctrine relatively recently. Its origins may be traced to this Court's decision in *Hines v. Davidowitz*, 312 U.S. 52 (1941). The Court

there held that a Pennsylvania law requiring aliens to register with state authorities, imposing more stringent requirements than imposed by federal law, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67.

The Court obviously intended that state law would be set aside only when enforcement of the state law would make it impossible—not merely more difficult—to enforce the federal law. "'[I]f the purpose of the act *cannot otherwise be accomplished* . . . the state law must yield.'" *Id.* at 67 n.20 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912). Indeed, this Court has generally viewed "obstacle" preemption as a type of "impossibility" preemption. *See Geier*, at 873 ("The Court has not previously driven a legal wedge . . . between "conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law.")

The *Geier* majority did in fact indicate that a state law, including a common law right, may be set aside as an "obstacle" where it causes "a conflict" that would "defeat [the federal law's] own objectives." *Id.* at 872. The Court relied on *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), where Justice Scalia explained that a federal law "cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be *absolutely inconsistent* with the provisions of the act," so that the federal law would "destroy itself." *Id.* at 227-28 (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204

U.S. 426, 446 (1907)) (emphasis added). In other words, "ordinary preemption principles" look to whether federal and state law "actually conflict," such that giving effect to the state law "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives." *Geier*, at 872.

Unfortunately, this Court's somewhat open-ended formulation "invites the courts to hypothesize and analyze potential situations in which tort remedies might stand as an obstacle to or frustrate a congressional purpose. Thus, courts can find obstacles where none exist." Betsy J. Grey, *Make Congress Speak Clearly*, *supra*, at 624. The Fourth Circuit has stated:

> While preemption under a theory of express or implied preemption is essentially a matter of statutory construction, preemption under a frustration of federal purpose theory is more an exercise of *policy choices by a court* than strict statutory construction.

Abbot v. American Cyanamid Co., 844 F.2d 1108, 1113 (4th Cir. 1988) (emphasis added). As Judge Starr has pointedly observed, "When judges preempt state laws in the absence of explicit congressional guidance, they in effect assume a legislative role without accepting legislative responsibility." Kenneth Starr et al., *The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association* 48 (1991).

In this case, as the Solicitor General has correctly stated, the lower court "gave too broad a

reading to this Court's decision" in *Geier*. Br. for the United States as *Amicus Curiae* in Supp. of Pet. at 8, *Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314 (U.S. Apr. 23, 2010). The court held that the then-existing Federal Motor Vehicle Safety Standard 208, requiring that the minivan in this case be equipped with either a Type 1 or Type 2 restraint in the rear inboard seat was not a "minimum" standard, as provided 49 U.S.C. § 30102(a)(9). Rather, the court held that carmakers were entitled to the option of using either type, and that tort liability for death or injury caused by the less safe option would stand as an obstacle to these "important means-related federal objectives." *Williamson*, 84 Cal. Rptr. 3d at 552. As the Solicitor General noted, a number of other courts have similarly misinterpreted and misapplied the doctrine of "obstacle" preemption to deny state tort remedies to injured persons. Br. for the United States, *supra*, at 8.

Amicus suggests that application of the doctrine of implied "obstacle" preemption to state tort remedies that do not actually render it impossible to apply federal law is not grounded in the Supremacy Clause. This Court has stated that there is "no general, inherent conflict" between federal safety regulations and "the continued vitality of state common-law damages actions." *Cipollone*, 505 U.S. at 518. As the Court recently made clear, "the Court should look to the federal statute itself, rather than speculate about Congress' unstated intentions." *Wyeth*, 129 S.Ct. at 1213 n.4. It is clear that plaintiffs tort causes of action in this case are not in direct conflict with the minimum safety standard for passenger restraints issued by NHTSA.

II. STATE TORT REMEDIES FOR WRONGFUL INJURY DO NOT "CONFLICT" WITH FEDERAL MANDATORY STANDARDS OR REQUIREMENTS.

The judicial determination that tort remedies for personal injury "stand as an obstacle" to Congress's purpose in enacting the National Traffic and Motor Vehicle Safety Act rests on the notion that a jury verdict establishes a legal requirement or mandatory standard on a par with a mandatory federal standard or requirement under the Act. This is a false conflict, based on misunderstanding of tort law remedies.

A. The Regulatory Impact of Tort Liability Is Indirect and Is Not a State Governmental Requirement Subject to Preemption by Federal Law.

"[T]he purpose of compensatory damages," as Justice Blackmun pointedly observed, "is to compensate." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting). A verdict in the Williamsons' favor in this case would support a judgment under state law ordering defendant to pay compensatory damages for the death of Thanh Williamson. But such a judgment would impose no requirement that Mazda make any change in any of its cars.[2]

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[2] The contrary view appears not to have been based on the effect of an award of damages, but on the possibility of unusual injunctive relief. Justice Stevens in the first oral argument in

As trial lawyers are well aware, a jury verdict in favor of the plaintiff in a products liability case, requires that the defendant compensate the plaintiff for the harm caused—but nothing more. *See* Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Advoc. 435, 455-57 (1992); Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance With Federal Standards*, 64 Geo. Wash. L. Rev. 415, 437-39 (1996).

A manufacturer might seek to avoid future liability in a future lawsuit by improving the design of its product, but it is not required to do so. The product may already have been taken off the market or replaced by a newer, safer model. The manufacturer may decide to address the hazard by a warning or by a different design change. It could

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Cipollone asked whether the trial court in that case—which sought damages based on failure to warn of the dangers of smoking—might impose such a requirement:

> And what if, [in addition to awarding damages] the court also granted an injunction against the future sale of cigarettes unless it had that warning on it?

Transcript of Oral Argument at 15, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (No. 90-1038). Plaintiff's counsel responded correctly that such an injunction is not available in product liability cases. *Id. See, e.g., National Women's Health Network, Inc. v. A.H. Robins Co.*, 545 F. Supp. 1177, 1181 (D. Mass. 1982). Nevertheless, Justice Stevens likely had such a circumstance in mind when he observed in *Lohr*, "It will be rare indeed for a court hearing a common-law cause of action to issue a decree that has the effect of establishing a substantive requirement for a specific device." 518 U.S. at 502-03 (plurality).

rationally decide, balancing the probability of future serious harm against the cost of eliminating the risk, simply to compensate any future victims.

In fact, most manufacturers sued for injury caused by their products do *not* change their product's design. Risk managers of Fortune 1000 corporations with actual product liability experience reported that as a result about 32 percent had improved the safety design of the product and about 37 percent had improved its labeling. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 U.C.L.A. L. Rev. 377, 408-09 (1994) (summarizing results reported in Nathan Weber, *Product Liability: the Corporate Response* 15 (1987).

At bottom, to the extent that product liability has a regulatory impact, it is an indirect one. It operates through private decisionmaking in the marketplace. By requiring the manufacturer to internalize the costs of injury as part of the price of the product, the potential for future liability creates a financial incentive for manufacturers to make their products reasonably safe. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973).

It is well-accepted that in a marketplace in which all actors have perfect knowledge of risks, the market itself would provide the most efficient allocation of resources to produce reasonably safe products. *See* Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: an Economic Justification for Enterprise Liability*, 76 Cornell L. Rev. 129, 161 (1990) (noting the wide acceptance of this proposition, known as the "Coase Theorem"). *See*

generally, Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). Thus, an ideal market would favor products with the lowest sum of the cost of injuries plus the cost of injury prevention.

Of course, real-world markets do not provide perfect consumer information, and manufacturers are able to "externalize" the injury costs of their products. Guido Calabresi, *The Costs of Accidents* 144-45 (1970). That is, the manufacturer can force consumers, taxpayers, and society generally to subsidize its products by bearing part of the cost of the injuries caused by those products. This places the manufacturer who invests in safety, adding to the product's price, at a competitive disadvantage. Product liability rules, by assessing risk retrospectively, compensate for imperfect consumer information. W. Kip Viscusi, *Reforming Products Liability* 66 (1991) ("The purpose of products liability is to fill the gaps left by market imperfections and to replicate the incentives that would have been generated had markets been functioning perfectly.").

In this way, product liability lawsuits "promot[e] optimal deterrence—the taking of precautions and selection of activities that minimize the sum of accident costs and accident avoidance costs." Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation, in Regulation Through Litigation*, 212, 232 (W. Kip Viscusi ed. 2002). It is for the manufacturer to decide rationally whether it is cheaper to prevent future injuries by investing in safety precautions or simply to compensate future victims. *Id.* Product liability duties therefore reflect a policy of making dangerous products pay their own way by internalizing costs. *See* Stephen G. Breyer,

Regulation and Its Reform 175 (1982) (product liability rule seeks "to place costs upon the party best able to avoid them").

Government pursues product safety in a far different way. Regulation is premised on the belief that the marketplace cannot achieve the level of safety society demands. In many ways, safety regulation is the polar opposite of tort liability. Administrative regulations are prospective; tort liability assesses past conduct. Regulations may mandate specific design or performance standards; the tort standard is "the general duty of every manufacturer to use due care to avoid foreseeable dangers." *Lohr*, at 501.[3] Regulatory penalties can be imposed to enforce compliance; a liability verdict is measured by the amount necessary to compensate for wrongful death and injury. *See generally*, Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357 (1984).

In his classic exposition, Judge Calabresi contrasts the indirect influence exerted on the market by tort law ("general deterrence") with governmental regulatory mandates ("specific deterrence"). Calabresi, *The Costs of Accidents*, *supra*, at 68-129. As one scholar summarized: "[U]nder a general deterrence regime, manufacturers, not government officials, make

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[3] The general duty imposed on product suppliers varies little among the states. James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 887 (1998) (the "overwhelming majority" of courts apply the same "risk-utility approach in determining design defects.").

decisions about product safety." Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L. Rev. 897, 927 (1988).

This Court has acknowledged this view. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); *English v. General Elec. Co.*, 496 U.S. 72, 85 (1990) (the effect of tort awards "is neither direct nor substantial enough to place petitioner's claim in the pre-empted field"); *Silkwood*, 464 U.S. at 257-58 (vesting federal agency "with exclusive regulatory authority over the safety aspects of nuclear development" was not inconsistent with allowing plaintiffs to recover for injuries caused by nuclear hazards). Justice Blackmun later described the import of these decisions: "The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations." *Cipollone*, 505 U.S. at 536-37 (Blackmun, J., dissenting in part).

In this case, if Mazda were held liable to the Williamsons for the death of Thanh Williamson due to the use of the unsafe lap-only belt, the company would be obligated to pay compensatory damages. The verdict and judgment would not require Mazda to install Type 2 seatbelts in the rear inboard seating position. If Mazda chose to do so, it would not be relieved of its obligation to pay damages to the Williamsons. If it chose not to do so, it would suffer no adverse consequences. If a future passenger was

injured and brought suit, the verdict in the Williamsons' favor here would have no impact on such a future lawsuit. That future plaintiff would be required to prove the same elements of a product liability cause of action that the Williamsons must prove.

Mere financial incentive to undertake some action is not the type of state mandatory requirement that the doctrine of federal preemption addresses. Preemption is concerned with the exercise of governmental power, not governmental persuasion.[4]

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[4] The statement in *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959), that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," makes no distinction between direct and indirect regulatory impact and so has little relevance to preemption outside the labor law context.

Garmon reversed an award of damages to an employer for loss of business due to union picketing. The Court ruled that with respect to such activities, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id.* at 245. As this Court later explained, *Garmon* was chiefly concerned with "ensuring that primary responsibility for interpreting and applying this body of labor law remain[ed] with the NLRB." *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 502 (1984). Thus *Garmon* involved the ouster of both federal and state courts from any regulation of certain labor activities, whether direct or indirect.

It is also significant that the *Garmon* Court carefully conditioned its preemption of state tort liability on the provision of alternative federal remedies. 359 U.S. at 243. Justice Harlan, concurring, cautioned that, where Congress has not provided such a remedy, "there is no ground for concluding that . . .

For example, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), involved a state statute that imposed surcharges on patient hospital bills paid by non-Blue Cross/Blue Shield providers. Commercial insurers argued that the statute was a preempted regulation of their ERISA plans because the law's effect was to make their insurance relatively more expensive. This Court held that the "indirect economic influence" of the surcharge did not "bind plan administrators to any particular choice" and so did not "function as a regulation of an ERISA plan itself." 514 U.S. at 659. *See also California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997) (state law resulting in financial incentive for employers to meet state apprenticeship requirements did not amount to regulation of ERISA program). Similarly, a financial incentive for companies to avoid future liability by exercising due care in the design of their products is not an exercise of state power in competition with mandatory federal regulation.

The fact that Mazda may choose not to change its design, even if a jury returns a verdict in the Williamsons' favor in this case, distinguishes tort liability from a mandatory regulation. The Court in *Geier* acknowledged some inconsistency in prior cases, some of which simply "*assume*[d] compliance with the state-law duty in question" by altering the design of its product. 529 U.S. at 882 (emphasis in

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[state] liabilities for tortious conduct have been eliminated." *Id.* at 252 (Harlan, J., concurring) (quoting *United Constr. Workers, Affiliated with United Mine Workers of Am. v. Laburnum Const Co.*, 347 U.S. 656, 665 (1954)).

original). The *Geier* Court found it unnecessary to resolve such differences. *Id.* However, the Court subsequently took up that question and clarified this important distinction:

> An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might "induce" a pesticide manufacturer to change its label should be viewed as a requirement. . . .
>
> A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement.

Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 443-45 (2005).

B. State Tort Remedies for Personal Injury Do Not Conflict with Federal Safety Standards and Requirements, but Are Complementary

Not only is tort liability not an obstacle to congressional purposes in enacting safety statutes, tort remedies complement administrative regulatory action in accomplishing those purposes.

Congress places the administrative regulatory apparatus in the hands of imperfect human beings, operating under a variety of external pressures and with limited resources. *See e.g.*, Institute of

Medicine, *The Future of Drug Safety: Promoting and Protecting the Health of the Public* 193-94 (Alina Baciu, Kathleen Stratton & Sheila P. Burke eds., 2006) (warning that the FDA "lacks the resources needed to accomplish its large and complex mission").

It should be no surprise, then, that federal safety regulation is an imperfect system. Automobiles with life-threatening design flaws—from the dangerous Ford Pinto fuel system to the recent Toyota unexpected acceleration problems—have caused mayhem on our highways, despite compliance with all applicable safety standards. *See* Jeff Wigington, *The Best-Selling Defect in America*, 39 Trial 62, 64 (July 2003) (noting the "laundry list of defective products that also met federal standards yet are known to kill people—such as the Ford Pinto and certain Firestone tires").

This is not a shortcoming unique to NHTSA. For example, most failure-to-warn prescription drug cases involve "risks that emerged after the drugs were approved by the FDA and were available to the public." Michael D. Green, *Safety As an Element of Pharmaceutical Quality: the Respective Roles of Regulation and Tort Law*, 42 St. Louis U. L.J. 163, 169 (1998); *see also* United States General Accounting Office, *FDA Drug Review: Post-Approval Risks 1976-85* 3 (1990) (over half of approved drugs had serious risks not detected until after FDA approval); Alastair J.J. Wood, *The Safety of New Medicines: The Importance of Asking the Right Questions*, 281 JAMA 1753, 1753 (1999) (discussing five drugs withdrawn from the market for safety reasons and stating that "a staggering 19.8 million

patients . . . were estimated to have been exposed to these 5 drugs before their removal").[5]

It is true that administrative agencies are able to draw upon scientific expertise in formulating safety standards, but they are not clairvoyant. A jury has the advantage of viewing the performance of a product retrospectively. Moreover, agencies lack the resources to comprehensively monitor post-marketing events involving the products they regulate. Consequently, it has long been true, as former FDA Commissioner David Kessler has written, that "tort law often informs regulatory decisions, and the FDA has often acted in response to information that has come to light in state damages litigation." David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 Geo. L.J. 461, 477 (2007-2008); *see also* Aaron S. Kesselheim & Jerry Avorn, *The Role of Litigation in Defining Drug Risks*, 297 JAMA 308, 308 (2007) ("In both the premarketing and postmarketing stages, lawsuits have helped uncover important and previously unavailable data about major adverse events."); Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 Yale J. Health Pol'y L. & Ethics 587, 612 (2005) ("The tort system should remain free to redetermine product safety in the light of information developed during litigation, because the

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[5] As Justice Stevens noted, "the Titanic 'complied with British governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage'" *Geier*, 529 U.S. at 903 n.19 (Stevens, J., dissenting) (quoting Nader & Page, *supra*, at 459).

FDA may not always uncover relevant safety information and may not act quickly enough upon the information that it does receive.").

This Court has recognized that the two prongs of America's approach to product safety—regulation and liability—are complementary and not mutually exclusive. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 668 (1993) (State "negligence liability could just as easily complement" railroad crossing regulations under the Federal Railroad Safety Act); *Bates*, 544 U.S. at 451 (tort actions "may aid in the exposure of new dangers associated" with the product and prompt the agency to "decide that revised labels are required in light of the new information that has been brought to its attention." Thus private remedies "would seem to aid, rather than hinder, the functioning of [regulation of pesticide labels]"; *Silkwood*, 464 U.S. at 264 (Blackmun, J., dissenting) (Tort damages "complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme."), *see also Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968) ("It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability.").

To hold that state tort liability actions are preempted as conflicting with federal safety regulation is to declare that America will henceforth rely solely on administrative regulation to assure safe consumer and workplace products. The federal government's safety agencies are not so omniscient, omnipotent, or immune from improper influence to justify such a drastic move.

C. State Tort Remedies Are Not an Obstacle to Congress's Goal in Setting Minimum Federal Motor Vehicle Safety Standards.

The lower court incorrectly assumed, without elaboration, that plaintiffs' cause of action necessarily conflicted with the purposes of Congress. Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 49 U.S.C. § 30101 et seq. "to reduce traffic accidents and deaths and injuries resulting from traffic accidents" in part, by "prescrib[ing] motor vehicle safety standards for motor vehicles and motor vehicle equipment." *Id.* The standard at issue here is Federal Motor Vehicle Safety Standard 208, which seeks "to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements . . . [and] equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208, S2 (1998). At the time the 1993 Mazda MPV Minivan in this case was manufactured, FMVSS 208 provided that Mazda could equip it with either a lap-only or lap-shoulder type seat belt. Mazda opted to equip the vehicle with the lap belt.

The court below offered no explanation how permitting plaintiffs to seek compensatory damages for the death of Thanh Williamson would defeat Congress's purpose. The Type 2, or lap-shoulder belt is significantly and indisputably safer, particularly for children. A recent study carried out with NHTSA support, found that among the children in the study who were seated in the rear-center seat, "those in vehicles equipped with a lap/shoulder belt are 81% less likely to sustain a serious injury than those

seated in the center rear equipped with a lap-only belt system." Center for Injury Research & Prevention, *Lap/Shoulder Belts in the Center Rear: Occupancy Patterns, Use Patterns, and Performance* (2010); *see also* 1 Nat'l Transp. Safety Bd., *Safety Study: The Performance and Use of Child Restraint Systems, Seatbelts, and Air Bags for Children in Passenger Vehicles* 100-01 (Sept. 1996) ("Abdominal bruising of moderate or worse severity and head injuries were typical of the injuries sustained by the children using lap-only belts. . . . The Safety Board believes that occupants seated in the center rear seat should be afforded the same level of protection as other occupants of the rear seat, who have been afforded lap/shoulder belts since January 1, 1990.). Such a safety improvement was clearly feasible. Indeed, most of the major auto manufacturers voluntarily equipped some models with Type 2 seatbelts in all rear seating positions. James J. Murphy, *Lap-Only Seatbelts Can Cause Injury and Death*, 35 Trial 37 (Nov. 1999).

The Williamsons' causes of action in this case proceed from the states' traditional and historic role in providing remedies for wrongful death and injury. This Court has recognized that such remedies can coexist with federal safety regulation without conflict. In *Silkwood*, for example, this Court found no inconsistency between "vest[ing] the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Silkwood to recover for injuries caused by nuclear hazards." 464 U.S. at 258. "Congress intended to rely solely on federal expertise in setting safety standards, and to rely on . . . juries to remedy whatever injury takes place," *Silkwood*,

464 U.S. at 264. There is no basis for preemption where Congress has "decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth*, 129 S.Ct. at 1200 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989). *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) ("It would have been perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims.").

In this case, this Court need not speculate whether Congress intended to rely on both tort liability and administrative regulation. Congress explicitly declared its intent "to stand by both" by explicitly defining the safety standards established under the Act as "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9). Imposing liability on a manufacturer for harm caused by using the less safe seatbelt permitted by the minimum standard clearly does not conflict with Congress's objective of reducing injuries and deaths in traffic accidents. *Cf. Sprietsma*, 537 U.S. at 64 (holding that the express preemption clause of Federal Boat Safety Act, 46 U.S.C. §§ 4301 *et seq.*, did not preempt common law tort claims, arising out of failure to install propeller guards on a boat engine, where the Act authorized the federal agency to establish "minimum safety standards." 46 U.S.C. § 4302(a)(1)).

Nor is there any indication that the congressional purpose underlying the Safety Act would be thwarted if carmakers were faced with an

incentive to install lap/shoulder seatbelts for all rear passengers. Here, as distinguished from the airbag requirement in *Geier*, NHTSA has not taken the position that automakers must be provided with the option of installing Type 1 or Type 2 restraints. Br. of the United States, at 9, 14-15. Rather, the government has consistently maintained that a minimum safety standard provided in a FMVSS, without more, does not conflict with a stricter state requirement. *Id.* at 15.

Congress removed any doubt on this matter in 2002 by enacting Pub. L. 107-318, 116 Stat. 2772, popularly known as "Anton's Law," which mandates the installation of lap/shoulder belts in rear inboard seating positions. NHTSA has promulgated a final rule amending FMVSS 208 to implement this requirement. *See* 69 Fed. Reg. 70904-01 (Dec. 8, 2004). Thus, it can scarcely be argued that the Williamsons' claim that Mazda should have equipped their minivan with a Type 2 seatbelt in the rear center seat is in conflict with Congress's purpose. Congress directed NHTSA to amend FMVSS 208 to impose just such a requirement.

III. BROAD "OBSTACLE" PREEMPTION OF STATE TORT REMEDIES ACTIONS UNDERMINES THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO A REMEDY FOR WRONGFUL INJURY.

A. "Obstacle" Preemption Bars the Fundamental Right to Seek Redress for Wrongful Personal Injury Despite the Absence of Express Congressional Intent.

The Founders were certainly familiar with the bedrock common-law principle: "Every right, when withheld, must have a remedy, and every injury its proper redress." 3 William Blackstone, *Commentaries on the Laws of England* 23, 109 (1765). Justice Powell wrote for this Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Id.* at 673 (quotation omitted).

Those "essential" rights include those which "Blackstone catalogued among the 'absolute rights of individuals'" protected by the common law. *Id.* at 661. Those Blackstonian rights consist of the rights to personal liberty, personal property, and personal security, including the right against wrongful injury to the person. 1 Blackstone, *Commentaries on the Laws of England* 120-34. Indeed, protection of those absolute rights is "the principal aim of society." *Id.* at 120.

Chief Justice John Marshall, echoing Blackstone, restated this principle for Americans:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Following the adoption of the Fourteenth Amendment, this Court pronounced it "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" under the Due Process Clause of the Fourteenth Amendment. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

This Court was mindful of this due process right to a remedy as it upheld the constitutionality of workers' compensation laws. In *New York Central R.R. Co. v. White*, 243 U.S. 188, 203 (1917), the Court "doubted whether the state could abolish all rights of action, . . . without setting up something adequate in their stead." *Id.* at 201. The Court squarely addressed this question shortly thereafter in *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 163 (1919), in which an injured worker challenged the elimination of his tort cause of action. The Court responded that the state's mandatory workers' compensation program did not violate due process "when established as a reasonable substitute for the legal measure of duty and responsibility previously existing." *Id.* at 163. *See also Crane v. Hahlo*, 258 U.S. 142, 147 (1922) ("No one has a vested right in any given mode of procedure, and so

long as *a substantial and efficient remedy remains or is provided* due process of law is not denied by a legislative change.") (emphasis added).

More recently, the Court was presented with a similar issue in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). The Price-Anderson Act eliminated the common law right of action against owners of nuclear power plants for harm resulting from a nuclear accident. In its place, the Act established a fund and a procedure to satisfy such claims. The Court upheld the Act's constitutionality, noting the "panoply of remedies and guarantees" provided by Congress, *id.* at 93, and concluding that "the Price Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces." *Id.* at 88.

The Court need not in this case restate the limits of congressional power in this respect. Congress did not expressly preempt state tort actions, *Geier*, at 868, and, indeed, has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

Instead, this Court is asked to hold that Congress eliminated this important and protected right without a word of explanation or acknowledgment.

This Court has instructed that it presumes Congress is "'familiar with common-law principles . . . recognized in ordinary tort litigation, and . . . likely intended these common-law principles to obtain, absent specific provisions to the contrary.'" *Will v.*

Michigan Dept. of State Police, 491 U.S. 58, 67 (1989) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)). Congress, of course, knows how to preempt state common law claims expressly as it has demonstrated a number of times "with drastic clarity." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., concurring); *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989) ("Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires," citing examples).

Given the importance of Americans' right to seek legal redress for wrongful injury, this Court has observed, it would be "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U.S. at 251; *see also Laburnum Const. Co.*, 347 U.S. at 663-64 (Where "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct," the Court refused preemption that would leave the injured respondent "without recourse or compensation."); *cf.*, *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (finding implied preemption of state nuisance law by the federal Clean Water Act, where the result "does not leave respondents without a remedy").

This Court recently explained that Congress's "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend [agency] oversight to be the exclusive means of

ensuring drug safety and effectiveness." *Wyeth*, 129 S.Ct. at 1200. As the Fifth Circuit even more recently stated, "the bar to a finding of preemption is set even higher because federal law provides no remedy for an injured consumer." *Demahy v. Actavis, Inc.*, 593 F.3d 428, 435 (5th Cir. 2010). Indeed, to deny an injured family such a fundamental right on the basis of little more than congressional silence and ambiguity would be "spectacularly odd." *Lohr*, 518 U.S. at 491 (plurality opinion).

B. "Obstacle" Preemption Undermines the Role of the States in our Federalist System.

A case involving preemption of state tort remedies is always "'a case about federalism.'" *Geier*, at 887 (Stevens, J., dissenting) (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)).

Providing legal recourse for those injured by dangerous products is assigned by the Constitution to the states:

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law *or a part of the law of torts*. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added).

Preemption of state tort remedies results in "a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the [plaintiffs'] injuries." *Lohr*, at 488-89. In this fashion, expanded use of implied conflict preemption of state remedies represents a "backdoor federalization" of tort law. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. L. Rev. 1353 (2006).

Our system of federalism does "not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). As Justice Powell observed, "by usurping functions traditionally performed by the States, federal overreaching . . . undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties." *Garcia*, 469 U.S. at 572 (Powell, J., dissenting).

This Court in *Garcia* held that the states' sovereignty is "more properly protected by procedural safeguards inherent in the structure of the federal system," by virtue of the States' representation in Congress. *Id.* at 552. The corollary to that proposition is that the States must be assured meaningful opportunity to protect their interests through congressional representation. That structural guarantee of federalism, and of the individual's right to remedies provided under state law, is subverted if courts freely preempt state remedies in the absence of congressional

consideration or expression of intent. As Justice O'Connor has explained:

> [A]s this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991).

Courts should therefore "avoid[] unintended encroachment on the authority of the States," *CSX Transp. Inc.*, 507 U.S. at 663-64, by limiting "obstacle" preemption to those circumstances where the court can be certain that Congress—not the administering federal agency which does not represent the interests of the states—has deemed state law an obstacle to its legislative purpose.

"Obstacle" preemption should no longer serve as a battlefield for business interests seeking immunity from state law obligations to make whole the victims of wrongful conduct. This Court should make clear that state law may be set aside as an "obstacle" to the purposes of Congress only where state law intrudes upon an area of overriding federal interest,[6] or where giving effect to a state law would

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[6] *E.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (federal authority to conduct foreign affairs); *United States v. Locke*, 529 U.S. 89 (2000) (safe design and operation of oil tankers navigating U.S. waters); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (federal immigration law).

make it impossible to accomplish Congress's purpose in enacting the federal statute. State tort remedies for wrongful injury or death rarely, if ever, fall within the scope of such properly bounded "obstacle" preemption where the injured persons would be left with no legal remedy at all

CONCLUSION

For the above reasons, the decision of the court below should be reversed.

Respectfully submitted,

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Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

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BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST[1]

The Attorneys Information Exchange Group (AIEG) is an organization of over 600 attorneys who practice civil litigation throughout these United States. AIEG was founded in the mid-1970's by attorneys who were then representing burn victims who were motorists in cars and trucks that were burning up in collisions. Its founding members dedicated themselves, and this organization, to the creation of a private cooperative entity, which would serve to educate and coordinate the acquisition of technical information germane to the fair and honest representation of Americans who have suffered serious or catastrophic injury as a result of defective designs in motor vehicles. Over the years, AIEG members have represented the victims of such infamous products as the Ford Pinto, General Motors cars and pick-up trucks with poorly designed fuel systems (*e.g.*, side saddle fuel tanks), Audi and Toyota vehicles with sudden, uncontrollable acceleration, and thousands of Ford Explorers with Firestone tires that have left untold numbers of Americans maimed. Members of AIEG on a daily basis are involved in pursuing products liability claims typically stemming from the faulty design or manufacture of motor vehicles. Our clients are those Americans who have suffered

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[1] This *Amicus Curiae* brief is filed pursuant to Rule 37 and consent to file it has been granted by written consent of the parties. Further, this Brief was not authored nor was any monetary contribution to the preparation or submission of this Brief provided by any party to this action.

catastrophic injury or the families of deceased loved ones. In the prosecution of these common law claims, we are called upon to study and address the relationship between vehicular design, injury causation and any relevancy of compliance with federal standards promulgated pursuant to the Safety Act. *Most often, it has been found that there is very little relationship between a vehicle's compliance with these standards and the safety performance of these products in real world accidents.* AIEG' s members have a vital interest in the effect of the decision of the California Court of Appeals (and other similarly decided cases) may have on its members and the clients they represent because motor vehicle manufacturers continue to produce vehicles which only meet the bare minimum federal safety standards, thereby resulting in the sale of vehicles which may not be reasonably safe. The decision reached by the Court of Appeals potentially allows product manufacturers to argue that compliance with any federal vehicle regulation that allows for alternative methods to satisfy these minimum regulations immunizes them from common law responsibility to build and sell non defective/safe vehicles. Likewise, the decision of the Court of Appeals is at odds with the balance intended by the United States Constitution, the United States Congress and the Executive Branch (in the issuance of Executive Order 12612) which has a continuing interest in limiting Federal Agencies from imposing their will upon States without a clear Congressional statement of the importance of taking such action and then only after careful study and consultation with

State representatives to minimize this excursion into the time-honored role of the Common Law.

SUMMARY OF THE ARGUMENT

In 1966, the United States Congress passed the National Traffic Safety Act (referenced as the Safety Act), in an effort to establish regulations for vehicle and vehicle equipment performance which would provide basic and minimum safety of vehicles sold in this country. Simultaneously, Congress authorized the establishment of a government agency to develop and promulgate these regulations, which became known as the National Highway Traffic Safety Administration (NHTSA). The legislators who passed the Safety Act in 1966 were quite aware of then existing regulations and standards which many of the states had promulgated, and which required automobile manufacturers to only sell cars in these respective states if these vehicles were equipped with certain devices, such as front seat seatbelts.

Congress was asked by some facets of the motor vehicle industry and the safety community to pass legislation which would have the effect of eliminating diverse state regulations, so that only one governmental agency would control the development and promulgation of standards which vehicle companies would be obliged to meet in order to market their products in this country. These standards were defined by Congress as "minimum standard[s] for

motor vehicle performance".[2] As the National Transportation Safety Board reported in 1970[3]:

> The imposition of Federal Motor Vehicle Safety Standards for certain characteristics of vehicle safety insures that a particular level of safety will be universally applied, *but* it does not insure that the highest level of safety will be the standard, nor does it insure that the highest practical level of safety will be available to purchasers in the market.

As a result of Congress' awareness of personal injury litigation and the application of the common law to question motor vehicle design safety [4], as well as the promulgation of some non-uniform state safety standards, the Safety Act addressed both issues. The Safety Act and its legislative history establish that Congress did *not* want conflicting safety regulations promulgated by state, local and federal regulators. This was made clear by the inclusion of the

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[2] 15 U.S.C. § 1391 (2) (1966, 1988 & Supp. III 1991).

[3] Special Study, The Roles of General Services Administration and Department of Transportation in Motor Vehicle Safety Standards, Report No. NTSB HSS 70 1 (June 3, 1970), (see page 4).

[4] *Larsen v. General Motors Corporation*, 397 F.2d 495 (8th Cir. 1968). *See generally*, Hoening, *Resolution of "Crashworthiness" Design Claims*, 55 St. John's L. Rev. 633 (1981).

preemption clause in 15 U.S.C. § 1392(d). Likewise, the Congress did *not* want the federal agency interfering with the citizenries' right to fair compensation under the common law, which was made crystal clear by enacting the Savings Clause in 15 U.S.C. § 1397(c). The federal regulations do not exempt any person from any liability under the common law.

What is evident upon a review of the legislative history of the Safety Act is that the Savings Clause is much more than a mere expression of Congress' belief that "some" tort claims remain viable despite the promulgation of vehicle regulations. The legislative history of this provision establishes that compliance with a motor vehicle safety standard should not even be permitted as a defense in product liability suits against an automobile manufacturer. The Senate Report noted that:

> [t]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law. S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966).

The House of Representatives considered the Senate's draft legislation and insisted upon the language of the enacted "Savings Clause", providing Congress' express intent to preserve all common law

claims. The House Committee Report provided:

> Common law liability - §108(c) of the reported bill [15 U.S.C. §1397(c)] provides that compliance with any Federal motor vehicles safety standard does not exempt a person from any liability under common law. It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability. H.R. Rep. No. 1776, 89th Cong. 2d Sess. 24 (1966).

Congressional sentiment explaining why the House of Representatives inserted §1397(c) was explained by Congressman Tim Triplett, when he stated:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product. Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, (Safety

> Act Hearing'), 89th Cong. 2d Sess. Part 2, 1249 (1966).

Unlike the language used by Congress in other legislation, here Congress expressed its intent (in section 1392(d)) to preempt *only* the conduct of states and political subdivisions:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment, any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. 15 U.S.C. § 1392(d) (1988 ed.).

In this instance, it is not just that Congress' statement of preemption does not mention common law, but rather that Congress specifically identified the state and political subdivision activity which it intended to preempt, *i.e.*, the establishment by a State or political subdivision of standards with respect to vehicles or equipment that are not identical to the federal standard. And, Congress also expressed its intent to preserve all aspects of the common law by stating that compliance with federal safety standards

does not exempt any person from any liability under common law.

It was, we respectfully submit, a mistake of honest but fallible proportions when this Court concluded in *Geier* that the Savings Clause was simply promulgated to allow for some common law claims shown not to be in conflict with regulations issued by the NHTSA. Congress intended by its language to establish minimum standards which all companies are required to meet before they can market their products in the United States. On the other hand, since Congress expected the federal agency to promulgate *only* minimum standards, it likewise preserved for all consumers the right to fair compensation vis-a-vis the jury system, and it expected that the "threat" of common law liability would spur manufacturers to do much more, or suffer liability for injury caused, then simply meeting these standards.

When Congress passed the Safety Act it did not establish any sort of administrative remedy for Americans injured by defectively designed and manufactured products, because it expected that common law remedies would address this harm. Over the past thirty years, the motor vehicle federal standards have, with few exceptions, not changed. A prime example of the stagnant nature of these standards is FMVSS 208 and what has been the course of that regulation regarding the type of seat belt equipment that may be installed in the second or third row of passenger vehicles. Suffice it to state, at the outset, that the NHTSA has never adopted a

regulation rejecting the safety efficacy of lap and shoulder belts in the rear seats of passenger vehicles. In fact, the opposite is the history of how NHTSA has viewed the safety value to be added by installing Type 2 (lap and shoulder belt) rather than Type 1 (lap belts) in the rear seats. It is, therefore, no wonder that the United States in its *Amicus* Brief has informed the Supreme Court that there is no grounds for finding implied preemption in the instant case.

We ask the Court to establish for all litigants the clear proposition that because Congress expressly preserved all common law remedies in promulgating the Safety Act, it must follow that there is no statutory authority to apply implied-conflict preemption here. And, therefore, courts should not be given license to impose their will upon injured consumers and preempt these claims, despite a manufacturer's satisfaction of the minimum safety regulations.

There is nothing unique about a federal minimum safety standard providing manufacturers with alternative means to meet a very basic level of crash safety, and allowing injured victims of non-crashworthy vehicles an opportunity to prove to juries that their injuries are attributable to a manufacturer's failure to go beyond the bear minimum in safety design. Certainly following this approach does not evidence nor facially establish a need for implied-conflict preemption. And, in fact, such lawsuits can only serve to promote improvements in design protection. In the event, however, that the Court should decide to analyze the issue here pursuant

to conflict-implied-preemption principles, we submit, as has the United States in its *Amicus* Brief, that there is no justification to find implied preemption.

ARGUMENT

A. Background

Over forty years ago, the publication of Ralph Nader's *Unsafe at Any Speed* (1965) helped spur two major developments in the law. First, it prompted attorneys and the courts to give increased attention and recognition to what was then a relatively recent engineering development--the design of vehicles to be crashworthy. Second, it prompted Congress to give increased attention to the need for federal motor vehicle safety legislation and, ultimately, the passage of the Safety Act of 1966. In the intervening years, the application of the common law to the field of automotive safety has allowed actions for the deaths and injuries that the motor vehicle industry knew would result from their longstanding refusal to install safety device.

B. Federal Statutory Framework.

Congress passed the National Traffic Safety Act in 1966 to reduce motor vehicle injuries and deaths. *See* S. Rep. No. 89-1301, 89th Cong., 2d Sess., 1-2 (1966). To this end, Congress empowered the NHTSA to prescribe "motor vehicle safety standards." 15 U.S.C. § 1392(a). The Act defined "safety standards" as

"*minimum* standard[s] for motor vehicle performance or motor vehicle equipment performance . . . " 15 U.S.C. § 1391(2) [Emphasis added]. The Safety Act contains a preemption section providing that once a standard is adopted, neither a State nor Political Subdivision may issue a standard that is not identical to a federal safety standard applicable to the same aspect of performance. 15 U.S. C. § 1392(d). Further, the Safety Act includes a Savings Clause which legislates that "[c]ompliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

More than 30 years after the passage of the Safety Act, this Honorable Court was called upon to decide, in relatively short succession, two cases that analyzed Congressional and Federal Agency preemptive intent in two common law claims, with very different regulatory history. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) and *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 870, 120 S.Ct. 1913, 1920, 146 L.Ed.2d 914 (2000). This precedent has spawned, in the past decade, literally hundreds of lower court decisions and several subsequent decisions of this Court as it has been called upon to decide the preemptive effect of other federal legislation and regulations applied to pleasure boat

propellers[5], medical devices,[6] over the counter medications[7], pesticides[8], etc.

C. Review of The Evolving Application of Principles of Federal Preemption.

This Honorable Court's construction of federal legislation, federal regulations and common law causes of action and the application of ordinary principles of federal preemption has, with all due respect, been somewhat less than precise. Perhaps the evolution of the Court's preemption methodology is the product of the variability of the statutes and regulations that it has been called upon to study. It is difficult not to notice the evolving sentiment of the Court's Majority in several pertinent decisions.

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[5] *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (propeller guard issue).

[6] *Riegel v. Medtronic*, 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008) (FDA regulations preempted tort claim for negligent marketing of medical device approved by the Agency.

[7] *Wyeth v. Levine*, --- U.S. ---, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (failure to warn claim was not preempted by the FDA regulations/standards). *Riegel, supra.*

[8] *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005).

Myrick,[9]

Absent an applicable standard, there is no occasion under the applicable statutory scheme to consider federal preemption of this common law claim.

> Because no federal standard exists, we need not reach respondents' argument that the term 'standard' . . . pre-empts only state statues and regulations, but not common law. We also need not address respondents' claim that the saving clause . . . does not permit a manufacturer to use a federalsafety standard to immunize itself from state common-law liability. 514 U.S. 280, 287, n 3.[10]

Because the States are independent sovereigns in our federal system, the Court noted that it has long presumed that Congress does not cavalierly preempt state-law causes of action. As a result, any understanding of the scope of a preemption statute must rest primarily on 'a fair understanding of congressional purpose.'

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[9] The Judgment of the Court was unanimous in *Myrick*-decided in 1995.

[10] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed 2d 700 (1996).

Congress' intent, of course, primarily is discerned from the language of the preemption statute and the 'statutory framework' surrounding it. . . . Also relevant, however, is the 'structure and purpose of the statute as a whole,' . . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." 518 U.S. at 485.

Geier,[11]

The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate-for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. . . . The language of the pre-emption provision permits a narrow reading that excludes common-law actions. . . . [Emphasis added.]

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[11] 529 U.S. at 868, 120 S. Ct. at 1918.

> . . . We now conclude that the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles.
>
> Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words '[c]ompliance' and 'does not exempt', 15 U.S.C. § 1397(k) (1988 ed.), *sound as if* they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one. . . It is difficult to understand why Congress would have insisted on a compliance with federal regulation precondition to the provision's applicability had it wished the Act to 'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act. 529 U.S. at 869.

Sprietsma,[12]

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[12] *Sprietsma, supra*, 537 U.S. at 63, 123 S.Ct. at 526 [citing *Geier*] (Unanimous decision).

. . . [T]he express pre-emption clause in § 10 applies to 'a [state or local] law or regulation.'. . . We think that this language is most naturally read as not encompassing common-law claims for two reasons. First, the article 'a' before 'law or regulation' implies a discreteness-which is embodied in statutes and regulations-that is not present in the common law. Second, because 'a word is known by the company it keeps',. . . the terms 'law' and 'regulation' used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If 'law' were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the pre-emption clause superfluous.

The Act's saving clause buttresses this conclusion. . . . It states that '[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.'

Bates,[13]

> . . . we consider whether petitioners' claims are pre-empted by § 136v(b) . . . 'Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.'
>
> The prohibitions in §136v(b) apply only to 'requirements'. An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might 'induce' a pesticide manufacturer to change its label should be viewed as a requirement . . . .
>
> That §136v(b) may pre-empt judge-made rules, as well as statutes and regulations, says nothing about the scope of that pre-emption. . . . Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual

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[13] *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443-44, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005).

> commitments plainly do not qualify as requirements for 'labeling or packaging'. None of these common-law rules requires that manufacturers label or package their products in any particular way. Thus, petitioners' claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted.
>
> *Wyeth*,[14]

Employing principles of implied preemption via the regulatory scheme of the FDA, the Court observed:

> *Wyeth* contends that the FDCA establishes both a floor and a ceiling for drug regulation: Once the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate, regardless of whether there is any evidence that the FDA has considered the stronger warning at issue. The most glaring problem with this argument is that all evidence of Congress' purposes is to the contrary. . . . Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938 statute or in any subsequent amendment. Evidently,

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[14] *Wyeth*, *supra*, — U.S. —, 129 S.Ct. at 1205.

> it determined that widely available state rights of action provided appropriate relief for injured consumers. It may also have recognized that state-law remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings. . . . 129 S.Ct. at 1199-1200.

In a Concurring Opinion, Mr. Justice Thomas stated:

> I have become 'increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied pre-emption.' . . . 129 S. Ct. at 1207.
>
> The Court's decision in *Geier* to apply 'purposes and objectives' pre-emption based on agency comments, regulatory history, and agency litigating positions was especially flawed, given that it conflicted with the plain statutory text of the saving clause within the Safety Act, which explicitly preserved state common-law actions by providing that '[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law', . . . [citations omitted]. In addition, the Court's reliance on its divined purpose of the federal law - to gradually phase

> in a mix of passive restraint systems, in order to invalidate a State's imposition of a greater safety standard was contrary to the more general express statutory goal of the Safety Act 'to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents', . . . This Court has repeatedly stated that when statutory language is plain, it must be enforced according to its terms. . . . The text in *Geier* directly addressed the precise question at issue before the Court, so that should have been 'the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' [citation omitted]. With text that allowed state actions like the one at issue in *Geier*, the Court had no authority to comb through agency commentaries to find a basis for an alternative conclusion. 129 U. S. at 1214-1215.[15]

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[15] The Dissenting Opinion in *Wyeth* observed that the federal agency's view of the scope of its statutory authority and regulatory application is a valuable indicator of the scope of implied preemption. Reflecting upon the decision in *Geier*, the *Wyeth* Dissent stated:

> Notwithstanding the statute's saving clause, and notwithstanding the fact that Congress gave the Secretary authority to set only "minimum" safety standards, we held Geier's state tort suit pre-empted. . . . [W]e relied heavily on the view of the Secretary of Transportation expressed in an *amicus* brief, that Standard 208 'embodies the Secretary's policy judgment that safety would best be promoted if

D. Lower Court's Have Misapplied The Supreme Court's Preemption Decisions

The Brief in support of the Petition for Certiorari filed by the United States aptly points out that many courts, like the one below, have misapplied the *Geier* rationale to a host of common law claims that do not warrant dismissal based on federal preemption.

> Manufacturers always have the 'option' of exceeding a minimum safety standard when NHTSA has decided not to mandate a more stringent alternative because of considerations of cost or feasibility, as NHTSA did in this case, and indeed, often does in considering regulatory alternatives. But if such an 'option' alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined. *Geier* does not mandate that result, because it determined that under the Safety Act,

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> manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car. (quoting Brief for United States as *Amicus Curiae*, O.T.1999, No. 98-1811, p. 25).

In the instant case, the Secretary of Transportation has written that the Williamson's lawsuit does not conflict with the relevant regulations.

> common law tort actions may proceed unless they conflict with a FMVSS, and here, there is no conflict. U.S. Government *Amicus* Brief, 2010 WL 1653014 *15.

E. The Court Should Reconsider Its Conclusion of The Savings Clause

Before we analyze the application of implied-conflict preemption, we ask that the Court reconsider the precise language Congress used when it included a state/political sub-division's standards "preemption clause" and a state common law "savings clause." It is, we respectfully submit, unfortunate that the sweeping approach to preemption based on perceived congressional purpose in *Geier* has led to an unconstitutional invalidation of state common laws. *Haywood v. Drown*, 129 S.Ct. 2108, 2133, 173 L.Ed.2d 920 (2009) (Dissent by Thomas, J. and joined by the Chief Justice and Justices Alito and Scalia).

In *Geier*, [529 U.S. at 871, 120 S. Ct. at 1920], the Majority explained why it studied implied preemption, stating:

> . . . the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors

> pre-emption, at least some of the time. But we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard.
>
> . . . *We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship.* Cf. post, at 1935, n. 16. *But there is no reason to believe Congress has done so here.* [Empahsis added]

The predicate employed by the *Geier* Court to reject the conclusion that Congress intended to preserve *all* common law actions, even if some might conflict with a NHTSA regulation, was capsalized by this query: "[w]hy, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake?" *Id.* But, with all due respect, that query should not have been raised given Congress' clear statements. And even more perplexing was the fact that after raising this inquiry, the Court did not read the Congressional Record for an answer, but instead it discerned the answer based upon general principles of federalism. Why make that inquiry when Congress made a clear distinction between state and political standards at one end of the spectrum and common law claims at the other? The language chosen by Congress

in the Safety Act was very similar to the statutory scheme studied in *Sprietsma*, *supra*, 537 U.S. at 62-64:

> The saving clause is also relevant for an independent reason. The contrast between its general reference to 'liability at common law' and the more specific and detailed description of what is pre-empted by § 10, including the exception for state regulations addressing 'uniquely hazardous conditions', indicates that § 10 was drafted to pre-empt performance standards and equipment requirements imposed by statute or regulation.
>
> Our interpretation of the statute's language does not produce anomalous results. It would have been perfectly rational for Congress not to pre-empt common-law claims, which-unlike most administrative and legislative regulations-necessarily perform an important remedial role in compensating accident victims. . . . Indeed, compensation is the manifest object of the saving clause, which focuses not on state authority to regulate, but on preserving 'liability at common law or under State law'. In context, this phrase surely refers to private damages remedies.

. These observations in *Sprietsma* harken back to the view expressed in the Dissenting Opinion in *Geier*:

> It is perfectly clear, however, that the term 'safety standard' as used in these two sections refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims. When the pre-emption provision refers to a safety standard established by a 'State or political subdivision of a State', therefore, it is most naturally read to convey a similar meaning. In addition, when the two sections are read together, they provide compelling evidence of an intent to distinguish between legislative and administrative rulemaking, on the one hand, and common-law liability, on the other. This distinction was certainly a rational one for Congress to draw in the Safety Act given that common-law liability-unlike most legislative or administrative rulemaking-necessarily performs an important remedial role in compensating accident victims. *Cf. Silkwood v. Kerr-McGee Corp.* . . . 529 U.S. at 896.

See also Wyeth v. Levin, supra, 129 S.Ct. at 1214 (Concurring Opinion of Mr. Justice Thomas).

F. What Did Congress Say in The Safety Act?

The statutory provision labeled *"Preemption"* states: [49 U.S.C. § 30103(b)]:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, *no State or political subdivision* of a State shall have any authority either to establish, or to continue in effect, with respect to *any motor vehicle or item of motor vehicle equipment*[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. (Previously found at 15 U.S.C. § 1392(d)).

The statutory provision regarding "Warranty obligations and additional legal rights and remedies" states [49 U.S.C. § 30103(d)]:

> Sections 30117(b)[Preemption], 30118-30121, 30166(f) and 30167(a) and (b) of this title *do not* establish or *affect a warranty obligation* under a law of the United States *or a State*. A remedy under those sections . . . of this title is in addition to other rights and remedies under other laws of . . . *a State*. [Emphasis added.]

Finally, Congress provided in Section 30117(e) that:

> Common law liability.—Compliance with a motor vehicle *safety standard* prescribed under this chapter *does not exempt* a person from liability at common law. [Emphasis added.]

Read together, these statutes prove that the preemption section was *not* aimed at altering any aspect of the American consumers' states rights because (1) a manufacturer remains liable for breach of warranties and (2) compliance with theses standards, issued by NHTSA, does not exempt a manufacturer from liability at common law.

In *Geier*, the Court posited that while Congress can create a statutory scheme that eliminates the application of ordinary preemption principles, why would they do so? The answer is found here:

> We need a traffic safety agency and we need to research our problem from end to end, *but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.*
>
> You may think that the manufacturer is afraid of Government regulations but the cry you are hearing may be 'Briar Fox, please don't throw me in the briar patch'. If the government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze

> under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of 'Our product meets the Government standards', and an already compounded problem will be recompounded.[16]

The decision in *Geier* to not follow the literal words of the Safety Act has led hundreds of courts to simply ignore what Congress intended. We, therefore, respectfully submit, that it's time to address this issue and rule that Congress expressly saved all common law claims despite the promulgation and compliance with any federal motor vehicle safety standard.

G. NHTSA's Regulatory Approach To Rear Seat Belts and Executive Order 12612

The 1968 Rule FMVSS 208 first took effect in 1968. Then, and through 1992, this regulation provided for compliance by the installation of lap belts or lap/shoulder belts at designated seating position beyond the first row. 32 Fed. Reg. 2415. This regulation contained no explanation or statement of policy with respect to the decision to list lap and/or lap shoulder belts as the restraint systems of choice in rear seating positions. *Id.*

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[16] Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, ("Safety Act Hearing"), 89th Cong. 2d Sess. Part 2, 1249 (1966).

1. The 1982 Petition

In 1982, NHTSA was petitioned to change FMVSS 208 to require only lap/shoulder belts in the rear seats of passenger cars. After the NHTSA studied this petition, it decided that because most Americans were not buckling up, there was no "cost-benefit" necessitating a change to FMVSS 208.[17]

2. 1984 Amendments to FMVSS 208

In 1984, NHTSA amended FMVSS 208 to require that manufacturers advise consumers in the Owner's Manual that rear seat lap/shoulder belts were available for retrofitting, and to specify how these additions could be made.[18]

3. 1986 NTSB Rear Seat Lap Belt Study

In 1986, the National Transportation Safety Board (the "NTSB") published a study describing the hazards associated with wearing a lap belt only in frontal collisions. [*Safety Study Performance of Lap/Shoulder Belts in 167 Motor Vehicle Crashes*, NTSB/SS-88/02]. Based upon this detailed investigation, the NTSB issued Safety Recommendations, which, stated that:

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[17] By 1984, some European car manufacturers had already installed lap/shoulder belts in the rear seats of their passenger cars.

[18] Clearly indicating a regulatory preference for lap and shoulder belts in the back seats.

> [g]iven the known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems.

With respect to new cars, the NTSB recommended that all designated positions in the rear seat should be equipped with lap/shoulder belts.

4. 1986 Petition To Amend FMVSS 208

In August 1986, NHTSA was again petitioned to require the installation of rear lap/shoulder belts in all new passenger cars. *See* 52 Fed. Reg. 22818-19 (June 16, 1987). The Agency granted the petition and began reexamining whether to change FMVSS 208 and require the installation of rear seat lap/shoulder belts. In 1987, NHTSA issued an Advance Notice of Proposed Rulemaking requesting comments on a proposal to amend FMVSS 208 to require lap/shoulder belts in rear seats of passenger cars. 52 Fed. Reg. 22818 (June 16, 1987). In this publication, the NHTSA estimated that replacing lap belts with lap/shoulder belts would raise effectiveness in reducing fatalities to 53 percent and reduce serious injuries to 50 percent. *Id.* at 22820. The NHTSA estimated that installing a lap/shoulder belt at the rear-center seat position would cost only

$20 per vehicle. *Id.* at 22819. In 1989, the Agency published its final rule requiring lap/shoulder belts in all rear outboard seating positions. 54 Fed. Reg. 25275 (June 14, 1989).

The NHTSA concluded that the greater effectiveness of rear seat lap/shoulder belts had become a significant factor because of the increased use of seat belts. *Id.* at 25276. This requirement was not extended to the center rear seat position nor to outboard seats in multipurpose passenger vehicles. *Id.* at 25278. See also, 54 Fed. Reg. at 46258. **NHTSA did, however, comment that if manufacturers were able to design and install lap/shoulder belts in these positions, it "is encouraged to do so".** Of course, NHTSA did not state any objection to installing a lap/shoulder belt instead of a lap belt in these other seat position.

Finally, in issuing this amended Rule, NHTSA stated that it had analyzed these amendments in accordance with Executive Order 12612 and determined that this Amendment did not warrant the preparation of a Federalism Assessment because it did not have any derisive affect on state law. *Id.*

5. The June 1999 Study[19]

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[19] While the relevancy of the regulatory events transpiring after the sale of the vehicle in question are not controlling, they are accorded some deference when they have remained the same *Riegel, supra* 552 U.S. at 326

In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars (DOT 808 945, "Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions"). NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts has significantly enhanced occupant protection, especially in frontal crashes." *Id.*

> In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone. . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent. *Id.*

6. The 2003 Proposed Amendment

In December 2002, President Bush signed "Anton's Law," which provided for improvements in child safety devices. *See* 68 Fed. Reg. 46546 (December 4, 2002). One provision of Anton's Law required that NHTSA amend FMVSS 208 to require the installation of lap/shoulder belts in rear-center seating positions by no later than December 2004. In August 2003, pursuant to this statutory directive, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (August 6, 2003). NHTSA stated that Anton's Law is ". . . fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its Notice of

proposed rulemaking, the Agency emphasized that requiring lap/shoulder belts in rear-center seats would not just benefit children, [but] "[i]t would also benefit older occupants." *Id.* On this point, the Agency cited the conclusions of its 1999 study, which found that requiring lap/shoulder belts in all rear seats would provide significant safety benefits for both adults and children. *Id.*

7. The 2004 Final Rule Requiring Lap/Shoulder Belts In Rear Center Seats

In 2004, NHTSA published a final rule requiring the installation of lap/shoulder belts in all rear seats. In this announcement, NHTSA specifically stated that *"[t]he final rule is not intended to preempt state tort civil actions."* 69 Fed. Reg. 70904, 70912 (December 8, 2004).

CONCLUSION

The core teaching of *Geier* is that regulatory options, standing alone, do not possess any preemptive force. If the mere existence of regulatory options were sufficient to preempt tort claims, then the Majority in *Geier* would not have needed to address the complex policy reasons underlying the air bag phase-in of FMVSS 208; it would have been sufficient to point out that the car maker had chosen to install one of several permitted regulatory options. *Geier*, however, never purported to rely on such an observation. To the contrary, the Court's decision included and is based on a detailed and exhaustive examination of the highly unusual history and framework of the air bag standard

of FMVSS 208. *Geier* thus makes clear that regulatory options do not exert any preemption force under the Safety Act *unless* they are based on special safety concerns that would be directly undermined by a common-law claim. As we now explain, no such concerns exist in this case.

For over thirty years, NHTSA has remained a major proponent of lap and shoulder belts. The regulatory history of FMVSS 208 shows at least two things: (1) a lap and shoulder belt system is significantly superior to a lap belt only, and (2) the government continuously expressed its hopes and goals to have lap and shoulder belts in every seated position in every motor vehicle as early as possible. And, conversely, NHTSA has never rejected as a safety imperative the inclusion of lap and shoulder belts at each seating designation.

The government's decision to defer making lap and shoulder belts a requirement was certainly not the same as, or tantamount to, a policy statement encouraging the continuing installation of lap belts only. The regulatory history in this instance is very much the same as what the Court considered in both *Myrick* and *Spriestma*. And, therefore, at the very least the same decision rejecting implied preemption should be found.

Respectfully submitted, this 29th day of July, 2010.

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No. 08-1314

In the Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Three

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This is such a case. The Chamber's members depend on a robust doctrine of implied preemption as protection against the pushmi-pullyu of state and local mandates that conflict or interfere with requirements imposed by federal law. Such protection is especially important in cases (such as this), which involve federally imposed design requirements that not only govern nationally distributed, mobile, border-crossing products but also embody a deliberate judgment by a specialized

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

federal agency based on complex considerations of safety, technological feasibility, and consumer behavior. The Supremacy Clause of the Constitution, which is the fountainhead of the doctrine of implied conflict preemption, serves a vital structural role in our Nation's government and economy by protecting all federal laws, programs, policies and prerogatives against encroachment and interference by subordinate governments (including by juries applying state tort law). Accordingly, the Chamber and its members have a substantial interest in ensuring that this Court resolve the important issues raised by this case correctly.

STATEMENT

1. The Supremacy Clause provides that the Constitution and federal laws and treaties "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. State and local laws that conflict with federal law are preempted "by direct operation of the Supremacy Clause." *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984).

This Court's decisions interpreting the Supremacy Clause – and articulating what has come to be known as the doctrine of implied conflict preemption – stretch back to the earliest days of the Republic. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). "[S]ince our decision in *M'Culloch*," the Court has explained, "it has been settled that state law that conflicts with federal law is 'without effect.'" *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

The Court's precedents have separately discussed "'conflicts' that prevent or frustrate the accomplishment of a federal objective" (so-called "obstacle" preemption) and "'conflicts' that make it 'impossible' for private parties to comply with both state and federal law" ("impossibility" preemption). *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873-74 (2000). In *Geier*, this Court recently refused to "drive[] a legal wedge" between the doctrines of obstacle and impossibility preemption, reaffirming its longstanding understanding that "both forms of conflicting state law are 'nullified' by the Supremacy Clause." 529 U.S. at 873-74.

This Court's *test* for obstacle preemption has been the same for almost 70 years, and is derived from *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941): The Supremacy Clause nullifies state or local law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See also *Perez* v. *Campbell*, 402 U.S. 637, 649-50 (1971) ("Since *Hines* the Court has frequently adhered to this articulation of the meaning of the Supremacy Clause.") (citing multiple cases). But the *doctrine* of obstacle preemption is much older than *Hines*, and indeed goes back to this Court's earliest decisions involving the Supremacy Clause. See *Perez*, 402 U.S. at 649 (obstacle preemption has roots extending at least back to *Gibbons* v. *Ogden*).[2]

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[2] See *Gibbons*, 22 U.S. (9 Wheat.) at 211 (Supremacy Clause nullifies state laws that "interfere with" Congress's statutes); see also *Houston*, 18 U.S. (5 Wheat.) at 22-24 (same for state laws whose enforcement would "thwart[]" or "oppose[]" the "will of Congress," even if they do not contradict federal law); *M'Culloch*, 17 U.S. (4 Wheat.) at 427 ("It is of the very essence of [federal] supremacy, to remove all *obstacles* to its action within its own sphere, and so to modify every power vested in subordinate [state] governments, as to exempt its own operations from their . . . influence.") (Marshall, C.J.) (emphasis added); *Savage* v.

2. This case arises against the backdrop of the National Highway Safety Transportation Administration (NHTSA)'s longstanding regulation of automobile safety pursuant to the National Traffic and Motor Safety Vehicle Safety Act of 1966 (Safety Act), 49 U.S.C. §§ 30101 *et seq.*, as amended. In enacting the Safety Act, Congress left no doubt that it intended to displace state and local law by including the following provision (entitled "Preemption"):

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

49 U.S.C. § 30103(b)(1).

The Safety Act also includes a provision described by this Court in *Geier* as the "saving" clause, which states:

> Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

49 U.S.C. § 30103(e). Although now included in the same section as the preemption clause as a result of a recodification in 1994, these two provisions were much more widely separated in the Safety Act as originally enacted. See 15 U.S.C. §§ 1392(d), 1397(k) (1988). In *Geier*, this Court authoritatively interpreted both provisions. It also clarified the implied preemption

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Jones, 225 U.S. 501, 533 (1912) (a "state law must yield" if it prevents "the purpose of" a federal law from being accomplished or "frustrate[s]" the federal law's "operation").

principles that govern the relationship between (a) federal motor vehicle safety standards (FMVSSs) promulgated by NHTSA under the Safety Act, and (b) state-law requirements imposed through common-law tort actions.

3. This lawsuit, which arises out of an unusual and tragic automobile accident in Utah, was initiated in the California state courts. Petitioners' basic theory of liability is that the 1993 Mazda MPV Minivan involved in the accident was defective because the middle-row center aisle seat had a lap-only (Type 1) seatbelt when it should have had a lap/shoulder (Type 2) seatbelt. Five of the seven seats in the vehicle had Type 2 belts. At the time the accident vehicle was manufactured, a federal safety standard governing occupant crash protection, FMVSS 208, 49 C.F.R. § 571.208 (1987), gave manufacturers the option of installing either a Type 1 or a Type 2 seatbelt in a middle-row center aisle seat.

The trial court ruled that petitioners' claims were impliedly preempted by FMVSS 208 because they sought to impose liability on the manufacturer for choosing the wrong seatbelt option granted by federal law. Pet. App. 5a-6a. The California Court of Appeal affirmed, joining a virtually unbroken line of post-*Geier* decisions by the lower courts upholding the defense of implied preemption in cases involving claims identical or similar to petitioners'. Pet. App. 15-18, 21-22, 24, 27. The California Supreme Court declined further review.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case can and should be decided under the "ordinary" principles of conflict preemption that were restated and applied in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 870-71 (2000). Nevertheless,

petitioners – and several of their supporting *amici* – urge this Court to go far beyond what it is necessary to decide this case and make radical and unwarranted changes to the doctrine of implied conflict preemption. The Chamber files this brief to address these arguments. Although many of these arguments would require this Court to overrule *Geier*, their proponents do not always acknowledge this fact, nor do they even attempt to provide the "special justification" required before a precedent of this Court is overruled. *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984).

The arguments of petitioners and their *amici* for wholesale changes to settled principles reflect a profound misunderstanding of the vital importance – and deep historical roots – of the doctrine of implied conflict preemption in our constitutional scheme. As this Court has repeatedly recognized, the implied preemption doctrine flows directly from the Supremacy Clause itself. And every form of implied conflict preemption – including obstacle preemption – has deep roots in this Court's decisions. Not surprisingly, then, this Court has repeatedly refused to "drive[] a legal wedge" between obstacle and impossibility preemption and has made clear that there are "no grounds . . . for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case." *Geier*, 529 U.S. at 873-74. And with good reason: obstacle and impossibility preemption serve equally crucial (albeit distinct) roles in protecting *all* of federal law and *all* federal regulatory programs from interference by state, municipal, and local governments.

Nevertheless, petitioners and their *amici* urge this Court to single out obstacle preemption for disfavored treatment or even abolish it altogether. According to

petitioners and some of their *amici*, obstacle preemption is somehow less important or entitled to less respect under the Supremacy Clause. They also contend that obstacle preemption should be jettisoned because it contains too much discretionary leeway and therefore federal and state judges cannot be trusted to apply it faithfully.

These arguments are meritless. Federalism provides no basis for declining to give full effect to the Supremacy Clause by tolerating state and local laws that conflict with federal law by frustrating Congress's purposes. Nor does it make any sense that the Framers would have wanted subordinate governments to remain free to frustrate and defeat federal laws and programs. Moreover, as the origins of the Supremacy Clause make clear, the Framers chose to assign responsibility for ensuring the supremacy of federal law *to the judicial branch* in the first instance. Obstacle preemption is part of that assignment, as this Court's earliest preemption cases recognize. What is more, recent scholarship has established that the Supremacy Clause is in the form of a "*non obstante*" clause – a directive specifically aimed *at judges* and instructing them *not* to construe federal laws narrowly to avoid conflicts with state laws. Finally, contrary to the arguments of petitioners and their *amici*, the inquiry into obstacle preemption is no more subjective than many other legal issues that judges are routinely called upon to decide.

ARGUMENT

As respondents demonstrate (Br. 2-3, 22-24), this case can (and should) be resolved simply by applying the legal framework articulated more than a decade ago in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), to a different portion of FMVSS 208, the same

motor vehicle safety standard that was at issue in *Geier*. The United States agrees with this approach, although it disagrees about the result. See U.S. Br. 8, 10-12. As respondents show, however, *Geier*'s legal framework requires affirmance because, as the lower court correctly held, petitioners' tort claims interfere and conflict with NHTSA's deliberate judgment, based on safety and other relevant considerations, that manufacturers of 1993 model year passenger vehicles should remain free to install either of two specified types of seatbelts on a middle-row, center aisle seat. Under settled principles of implied preemption law that were restated and applied in *Geier*, that claim is clearly preempted.

Perhaps grasping that they cannot win under *Geier*, petitioners and some of their *amici* shoot for the moon, urging this Court to overrule *Geier* in multiple respects (not all of which they acknowledge). And they go even further, urging the Court to perform radical surgery on the doctrine of implied preemption by doing away entirely with obstacle preemption and drastically shrinking other forms of ordinary conflict preemption. See, *e.g.*, Pet. Br. 21 (arguing that conflict preemption should operate only where there is "clear evidence" of "an irreconcilable conflict" between federal and state law); Public Justice Br. ("PJ Br.") 34-35 (urging nullification of "obstacle" preemption and further limitation of conflict preemption); American Ass'n for Justice Br. ("AAJ Br.") 7-13 (same). As explained below, these arguments are based on serious misunderstandings concerning the origin, nature, and vital importance of the doctrine of implied preemption in all of its varied forms.

I. THE COURT SHOULD DECLINE THE INVITATION OF PETITIONERS AND THEIR *AMICI* TO OVERRULE *GEIER*

Throughout their brief, petitioners devote substantial attention to trying to distinguish *Geier*, emphasizing repeatedly that although both that case and this involve FMVSS 208, *Geier* involved the 1984 version of that regulation (not the 1989 version), the standards governing passive restraints (not seatbelts), and the front seating position (not the rear inboard position). Pet. Br. 12-13, 15-16, 21-22, 26-27, 35-44. Although these factual differences are certainly true, they do not provide any reason to apply a different *legal framework* to the task of analyzing the implied preemption issue before the Court. See Resp. Br. 22. As the government acknowledges (U.S. Br. 8, 11), this case should be resolved by applying the *Geier* framework to the relevant version and regulatory standards of FMVSS 208 that are at issue in this case. There is simply no need to address broader arguments (including the so-called "options only" theory that so much of petitioners' brief is devoted to attacking). See Resp. Br. 23-24 & n.9.[3]

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[3] At various points, petitioners and their *amici* suggest that *Geier* tacitly *rejected* the broader "options only" theory because (they say) this Court was "well aware of" it but "adopted a much narrower theory of implied conflict preemption." Pet. Br. 29-30; see also Attorneys Information Exchange Group Br. 33 (claiming that this is the "core teaching" of *Geier* because "[i]f the mere existence of regulatory options were sufficient to preempt tort claims, then" the Court "would not have needed to address the complex policy reasons underlying the air bag phase-in"). This argument confuses the Court's decision *not to reach or address* a broader theory of preemption with a *rejection* of that unexamined theory.

In multiple ways, petitioners and their *amici* advance arguments that effectively ask this Court to revisit and overrule *Geier*. As this Court has repeatedly made clear, however, principles of *stare decisis* place a heavy burden on those seeking to overturn precedent. See, *e.g.*, *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984) ("special justification" required for overruling precedent). In making their various arguments for overruling *Geier*, petitioners and their *amici* fail to acknowledge this high hurdle and do not even come close to providing the requisite "special justification" for the many volte-faces they advocate.

A. *Geier* Established That Ordinary Principles Of Implied Conflict Preemption, Undistorted By Special Burdens Or Presumptions, Apply To The Safety Act

As a threshold matter, petitioners argue that to prevail, respondents must overcome "the strong presumption against preemption." Pet. Br. 21, 23; see also Illinois et al. Br. ("Ill. Br.") 8, (claiming that affirmance would "do violence to the presumption against federal preemption"); *id.* at 10, 25 (same). Petitioners never acknowledge, however, that an indistinguishable argument was rejected in *Geier*. In *Geier*, the plaintiff argued that any proponent of a defense of implied preemption under the Safety Act must carry a "special burden." 529 U.S. at 870-74. This Court emphatically rejected that argument:

> Neither do we believe that the pre-emption provision, the saving provision, or both together, create some kind of "special burden" beyond that inherent in ordinary pre-emption principles – which "special burden" would specially disfavor preemption here. . . . [N]othing in the Safety Act's

> language refers to any "special burden." . . . Nothing in the statute suggests Congress wanted to complicate *ordinary experience-proved principles of conflict pre-emption* with an added "special burden."

Id. at 870, 872, 874 (emphasis added). Instead, the Court explained, "ordinary conflict pre-emption principles" apply. *Id.* at 871; see also *id.* at 874 (same).

The Court had good reasons for rejecting this plea for imposition of a "special burden." Such a requirement, the Court explained, would "promise practical difficulty by further complicating well-established pre-emption principles that already are difficult to apply." 529 U.S. at 873; see also *ibid.* (citing "considerations of . . . administrative workability"). In addition, limiting the "special burden" to arguments based on obstacle preemption would create complexities and "complicat[ions]" and "would engender legal uncertainty with its inevitable systemwide costs." *Id.* at 874. Finally, the Court held that "two provisions" of the Safety Act – the preemption provision and the "saving" clause – when "read together, reflect a *neutral policy*, not a specially favorable or unfavorable policy, towards the application of ordinary conflict pre-emption principles." *Id.* at 870-71 (emphasis added). For all of these reasons, this Court rejected the proposed "special burden" requirement and made clear that "ordinary experience-proved principles of conflict pre-emption" must be applied. *Id.* at 874. This reasoning dooms petitioners' heavy reliance on a "strong presumption against preemption" and their related insistence that, to prevail, respondents must provide "clear evidence" of "an irreconcilable conflict." Pet. Br. 21, 23.

B. *Geier* Rejected The Argument That Obstacle Preemption Should Be Treated Differently From Other Forms Of Conflict Preemption

Next, petitioners and their *amici* argue that obstacle preemption is somehow suspect and thus should be treated differently from other types of implied conflict preemption. Indeed, *amici* go so far as to urge the Court to do away with obstacle preemption. See PJ Br. 34-35; AAJ Br. 7-13. For reasons discussed in Section II below, the various criticisms of obstacle preemption they advance are meritless. For present purposes, however, what is important is that *Geier* itself rejected this very argument:

> The Court has not previously driven a legal wedge – only a terminological one – between "conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are "nullified" by the Supremacy Clause, . . . and it has assumed that Congress would not want either kind of conflict. . . . We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case.

529 U.S. at 873-74 (citations omitted).

The Court's refusal to treat obstacle preemption as a special or disfavored kind of implied preemption did not originate in *Geier*. Almost 60 years before *Geier*, in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), this Court acknowledged the variety of verbal formulations it had used to describe state laws that are nullified because they stand in conflict with federal law: "This Court, in

considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Id.* at 67. At the same time, however, the Court refused to draw distinctions or create hierarchies among these forms of conflict, explaining that "none of these expressions provides an infallible constitutional test or *an exclusive constitutional yardstick*." *Ibid.* (emphasis added).

In rejecting the argument for disfavored treatment of obstacle preemption, the Court in *Geier* again explained that such an approach would "promise practical difficulty by further complicating well-established pre-emption principles." 529 U.S. at 873. "That kind of analysis," the Court added, would also create uncertainty "as courts tried sensibly to distinguish among varieties of 'conflict' (which often shade, one into the other) . . . ." *Id.* at 874. Here again, neither petitioners nor their *amici* make even the slightest effort to explain why this holding in *Geier* should now be overruled.

C. *Geier*'s Understanding Of The Safety Act's "Saving" Clause Is Correct And Should Not Be Overruled

Purporting to find "contradictory conclusions" as well as "confusion" and "equivocation" in *Geier*'s analysis of the Safety Act's "saving" clause, 49 U.S.C. § 30103(e), petitioners' *amici* ask the Court to "clarify" that provision's meaning. PJ Br. 2-3, 21-23. In fact, this Court's analysis in *Geier* of the "saving" clause was quite clear, and what *amici* are really requesting (as they put it in one their more unguarded moments) is

that the Court "reconsider" *Geier*'s interpretation. *Id.* at 2; cf. also Ill. Br. 25 (stating that *Geier* "deprive[d] the saving clause of its full effect" and this "make[s] it a strong candidate for reexamination by the Court at some point"). Like the other arguments advanced by petitioners and their *amici* for overruling *Geier*, this argument is wrong and should be rejected.

In *Geier*, this Court made clear that the saving clause does not "save" common-law requirements that would otherwise be preempted by operation of the Safety Act's preemption provision, 49 U.S.C. § 30103(b)(1). Instead, the clause is directed not at preemption at all but rather at the state-law affirmative defense of compliance with government standards. At bottom, the "saving" clause's function is to ensure that common-law liability for compensatory damages is not defeated though the application of the state-law compliance defense.

American tort law has long recognized the "important distinction" between: (1) regulatory compliance as an affirmative defense to common-law and other tort liability, and (2) federal preemption of state law. RESTATEMENT OF THE LAW (THIRD): PRODUCTS LIABILITY § 4, cmt. e (1998) ("RESTATEMENT (THIRD)"). As the American Law Institute has explained (*ibid.*):

> When a court concludes that a defendant is not liable by reason of having complied with safety design or warnings statutes or regulation, it is deciding that the product in question is *not defective as a matter of the law of that state*. . . . In contrast, in federal preemption, the court decides as a matter of *federal law* that the relevant federal statute or regulation reflects, expressly or impliedly, the

> intent of Congress to *displace state law*, including state tort law, with a federal statute or regulation. . . . [A] determination that there is preemption nullifies otherwise operational state law.

See also RESTATEMENT OF THE LAW (SECOND) OF TORTS § 288C (1965). The compliance-with-government-standards defense is a close cousin of the tort-law doctrine under which *noncompliance* with a relevant safety standard is sometimes regarded as negligence *per se*. See RESTATEMENT (THIRD) § 4, cmt. d. Nearly every state recognizes the affirmative defense of regulatory compliance. See III. Br. 30-31.

The Safety Act's "saving" clause makes no mention of preemption and instead clearly targets the compliance defense under state law. See 49 U.S.C. § 30103(c) ("*Compliance* with a motor vehicle safety standard prescribed under this chapter does not *exempt* a person from liability at common law.") (emphasis added). In *Geier*, the Court recognized this and acknowledged the important distinction between preemption and the compliance defense. Significantly, the Court in *Geier* did *not* hold that the "saving" clause operated by its own force to "save" common-law claims from preemption under the statute's express preemption clause. Instead, as petitioners at one point acknowledge (Pet. Br. 13), the Court relied on the "saving" clause only indirectly, as a reason why the preemption clause must be interpreted narrowly to exclude "standards" imposed through common-law actions. See 529 U.S. at 867-68.[4]

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[4] The Court went on to explain that, "[w]ithout the saving clause, . . . it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions." 529 U.S. at 868. But if that reading were accepted, the preemption clause "would pre-empt all nonidentical state

The Court in *Geier* went on, moreover, to squarely *reject* the argument that the "saving" clause operated to "save" common-law claims from any form of *implied* preemption. 529 U.S. at 869-74. Accord Pet. Br. 13. In so doing, the Court expressly noted that the language of the "saving" clause did not appear to be aimed at preemption at all. Invoking the *Restatement* and specifically citing the distinction "between state-law compliance defense and a federal claim of pre-emption," the Court explained:

> The words "[c]ompliance" and "does not exempt," 15 U.S.C. § 1397(k) (1988), *sound as if they simply bar a special kind of defense*, namely, a defense that compliance with a federal standard *automatically* exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one.

Geier, 529 U.S. at 869-70 (emphasis added).

Thus, the Court in *Geier* squarely held that the "saving" clause does not function to "save" common-law that would otherwise fall within the scope of the preemption clause, but rather affects preemption only in an indirect way, by necessitating a narrower reading of the Safety Act's preemption clause. This conclusion was based on extensive briefing on the issue in *Geier* as well as the Court's concern that a broader reading of the

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standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard." *Ibid.* If that were true, then "few, if any, state tort actions would remain" that the saving clause could possibly "save" from being defeated by the compliance defense. *Ibid.* To preserve some meaningful function for the "saving" clause, therefore, the Court interpreted the Safety Act's preemption clause narrowly as excluding "standards" imposed though common-law actions. Accord Pet. Br. 13.

"saving" clause "would upset the careful regulatory scheme established by federal law." 529 U.S. at 870 (citing *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998)). Moreover, Congress knows full well how to save certain requirements from an express preemption clause and indeed has done so in the Safety Act itself by specifying, for example, that "identical" state and local standards are excluded. 49 U.S.C. § 30103(b)(1). Congress also knows how to draft a stand-alone provision aimed at saving certain state or local laws from preemption (as opposed to the compliance defense). It has done so many times.[5]

Despite *Geier*'s holding that the Safety Act's "saving" clause saves common-law claims from the regulatory compliance defense and not from preemption (or from the preemption clause), the government states that "petitioners' cause of action is *saved from preemption by the saving[] clause*" unless it fails the test for obstacle preemption. U.S. Br. 10-11 (emphasis added); see also *id.* at 2-3 (stating that *Geier* "held that the saving[] clause removes common-law tort actions from the scope of the express preemption clause"). Petitioners likewise at one point claim that "*Geier* expressly held that the Safety Act's saving[] clause *preserves* common-law actions seeking to establish greater vehicle safety than a regulatory standard setting a safety floor." Pet. Br. 26. Petitioners fail to mention, however, that such preservation occurs

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[5] See, *e.g.*, 7 U.S.C. § 2910(a) ("Nothing in this chapter may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State."), *id.* § 4512(a) ("Nothing in this chapter may be construed to preempt or supersede . . . ."); *id.* § 6109 (same); 10 U.S.C. § 2694(d); 15 U.S.C. § 77s(c)(3)(C); 16 U.S.C. § 831c-3(d); 20 U.S.C. § 6737(e); 42 U.S.C. § 247–4n(f).

because of the "saving" clause's impact on the defense of regulatory compliance, not on preemption. Given the "saving" clause's true target, it simply makes no sense to suggest (as the government does) that the "saving[] clause would be greatly undermined" (U.S. Br. 19) if petitioners' claims were held to be impliedly preempted.

At the end of the day, petitioners' *amici* provide no persuasive reason why this Court should overrule *Geier*'s interpretation of the saving clause. Although that is reason enough to reject their arguments, it is worth noting that *amici* do not seem to grasp the full ramifications of their revisionist position. If this Court were to repudiate its interpretation of the "saving" clause and instead hold that Congress "intended to 'save' from preemption claims that a car maker should have done more than the minimum required by a federal auto safety standard" (PJ Br. 3), that would *also* necessarily require the Court to revisit and abandon its narrow interpretation of the Safety Act's *preemption provision*. The reason is simple. It is not possible for the "saving" clause to "save" state-law requirements from the preemption clause unless those requirements are covered by the preemption clause in the first place. Thus, to adopt *amici*'s interpretation of the "saving" clause, the Court would need to first hold that the preemption clause's reference to "standards" includes common-law duties. Whatever else petitioners' *amici* might say about the Safety Act, we are quite confident they would oppose that result.

II. THE COURT SHOULD REJECT THE BROADER INVITATION TO ABOLISH OBSTACLE PREEMPTION OR OTHERWISE ALTER THE SETTLED LAW OF IMPLIED PREEMPTION

Petitioners' *amici* are not content simply with asking this Court to overrule *Geier* in multiple respects. They go further and launch a frontal attack on the doctrine of obstacle preemption itself, urging the Court to nullify that doctrine and make a variety of other radical changes to settled law (such as limiting implied conflict preemption to the exceedingly narrow category of cases where it is physically impossible to comply with both federal and state mandates). See, *e.g.*, PJ Br. 34-35 (urging nullification of "obstacle" preemption); AAJ Br. 7-13 (arguing that obstacle preemption should be reduced to "impossibility" preemption). *Amici* purport to find support for these far-reaching arguments in the history and language of the Supremacy Clause and in principles of federalism. Constitutional Accountability Center Br. 2-7; AAJ Br. 2, 8, 34-37. At every turn, however, their arguments reflect a profound misunderstanding of origins and function of the Supremacy Clause as well as of this Court's implied preemption decisions. As explained below, the doctrine of implied conflict preemption (including obstacle preemption) has deep roots in the Supremacy Clause and serves a vital structural role in protecting the national government and federal laws from interference by States and localities.

A. The Doctrine Of Conflict Preemption Flows Directly From The Supremacy Clause, Which The Framers Adopted Over Structural Alternatives To Entrust The Judiciary With The Responsibility To Police Conflicts Between State And Federal Law

Federal preemption of state and local law is an ordinary, intended – and indispensable – feature of our constitutional scheme. Congress's authority to legislate preemptively pursuant to its powers enumerated in Article I of the Constitution, including the Necessary and Proper Clause, U.S. CONST. art. I, § 8, is beyond dispute and has been described by this Court as "[a] fundamental principle of the Constitution." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000).[6] In scores of statutes covering a wide array of subjects, Congress has elected to include provisions that expressly preempt state and local law.

Moreover, it is beyond dispute that Congress's handiwork has a preemptive effect even in the absence of such express preemption provisions. This result flows directly from the Supremacy Clause, which the Framers of the Constitution included to remedy glaring shortcomings in the Articles of Confederation. See

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[6] This constitutional basis is important because it explains why the exercise of preemptive authority by Congress raises no serious concern under the Tenth Amendment, which provides that "[t]he powers *not delegated* to the United States by the Constitution, nor prohibited by it to the States, *are reserved* to the States respectively, or to the people." U.S. CONST. amend. X (emphasis added). "If a power *is* delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has *not* conferred on Congress." *New York* v. *United States*, 505 U.S. 144, 156 (1992) (emphasis added).

Hughes v. *Oklahoma*, 441 U.S. 322, 325 (1979) (the Framers believed that "to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations . . . among the States under the Articles of Confederation"). One legal scholar has aptly summarized the shortcomings of the Articles of Confederation:

> In the absence of something like the Supremacy Clause, state courts might have sought to analogize federal statutes to the law of a foreign sovereign, which they could ignore under principles of international law. . . .[Moreover,] [t]he Articles had not been ratified by conventions of the people in each state; states had manifested their assent merely by passing ordinary statutes authorizing their delegates to sign the Articles . . . . James Madison fretted that as a result, "whenever a law of a State happens to be repugnant to an act of Congress," it "will be at least questionable" which law should take priority . . . .

Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 247-48, 251 (2000) (quoting James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 PAPERS OF JAMES MADISON 345, 352 (R. Rutland & W. Rachal eds. 1975)).

To address these structural deficiencies in the Articles, the Framers included the Supremacy Clause, which broadly provides that "the Laws of the United States . . . shall be the *supreme* Law of the Land . . . *any* Thing in the Constitution or Laws of *any* State *to the Contrary notwithstanding*." U.S. CONST. art. VI, cl. 2 (emphasis added). The federalism principles embodied in the Supremacy Clause plainly favor federal over state authority, not vice versa as petitioners' *amici* suggest.

As a consequence of the Supremacy Clause, all federal laws are automatically preemptive of state and local laws to the extent that the latter impose conflicting obligations or requirements.

To understand the importance and vital role of the Supremacy Clause, and to see the error of petitioners' *amici*'s arguments, it is useful briefly to review the Supremacy Clause's genesis in the Constitutional Convention. During the Convention, the Founders considered "three mechanisms for resolving conflicts between federal and state law." Bradford Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1348 (2001).

First, the Virginia (or Large State) Plan proposed "authorizing the Union to use military force to coerce the states to comply with federal law." Bradford Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 325 (2003). But "[t]he delegates were immediately opposed to the use of force" and "[t]he Convention tabled the proposal and never seriously entertained this alternative." *Id.* at 325-26 & nn.44-47.

Second, the Virginia Plan alternatively recommended "that the National Legislature ought to be impowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union . . . ." James Madison, *Notes on the Constitutional Convention* (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed. 1911) ("FARRAND'S RECORDS"). Under this "congressional negative" as originally proposed, Congress alone would have had the power to "negative" all state laws that, in Congress's judgment, violated the federal Constitution. The delegates apparently envisioned the congressional

negative, by analogy to the Crown's prerogative to approve Colonial laws, as operating to *prevent* state laws from going into effect *until* Congress acted (except in special circumstances).[7]

Third, the New Jersey Plan included a resolution that "was in substance and concept, if not in form, similar to the current language of the Supremacy Clause." Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2089 (2000). It "would have required state courts (subject to federal appellate review) to enforce the Laws of the United States . . . as 'the supreme law of the respective States.'" Clark, *supra*, 72 GEO. WASH. L. REV. at 327 (quoting 1 FARRAND'S RECORDS 245).

The Convention initially approved the "congressional negative" in its original form. *Id.* at 326. But Charles Pinckney "moved to expand the negative" by giving Congress the power to negate any state law that Congress regarded as "improper" (rather than merely contrary to the federal Constitution). At that point, the small-State delegates strongly objected, and the Convention not only rejected Pinckney's proposal but also "subsequently reconsidered and rejected even the original congressional negative." *Ibid.* Even the original congressional negative was unacceptable to a

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[7] See, *e.g.*, 2 FARRAND'S RECORDS 27 (Madison) (arguing that anything short of the congressional negative would be ineffective because it would allow the States to "pass laws which will accomplish their injurious objects before they can be repealed" by Congress or invalidated by the federal courts); *ibid.* (Martin) (in criticizing the proposed congressional negative, posing the following rhetorical question: "Shall all the laws of the States be sent up to the Genl. Legislature before they shall be permitted to operate?"); *id.* at 390 (Mason) (voicing identical concern); 1 FARRAND'S RECORDS 167 (Bedford) (same).

majority of States because it "would have allowed *Congress* to determine for itself the scope of its powers vis-à-vis the states." *Ibid.* (emphasis added).

"Although th[e] 'Supremacy Clause' [in its initial form] was originally rejected as part of the New Jersey Plan, the Convention subsequently adopted the Clause immediately after rejecting the congressional negative." *Id.* at 327. In so doing, the Convention rejected the arguments of James Madison (who had been the primary drafter of the Virginia Plan) that adoption of the congressional negative was "essential to the efficacy & security of the Genl. Govt." 2 FARRAND'S RECORDS 27. Disagreeing with Madison, Gouverneur Morris explained that any "law that ought to be negatived *will be set aside in the Judiciary departmt.* and if that security should fail; may be *repealed by a Nationl. law.*" *Id.* at 28 (emphasis added). Similarly, Roger Sherman argued that the congressional negative was "unnecessary" because the state courts "would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived." *Id.* at 27.

As the foregoing history make clear, the Convention delegates who opposed the congressional negative did so because, among other things, they viewed it as unnecessary once the Supremacy Clause had been included in the Constitution. The Supremacy Clause *assigned to the courts* in the first instance the duty to ensure that state laws that were inconsistent with federal laws would be accorded no effect (and thus preempted). Failing that, Congress could always take further action by passing preemptive laws to address the situation.

Finally, the specific language of the Supremacy Clause confirms the Framers' intent that it be enforced by the Judiciary. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The first clause establishes a hierarchy of federal law and authority; the second is expressly directed at "Judges." As for the third clause – "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" – recent scholarship has established that its form would have been understood by the Framers (and eighteenth-century judges) as a so-called "*non obstante*" clause. Such clauses were specifically *directed at courts* and understood as an instruction *not* to employ the traditional presumption against implied repeals (which might induce strained interpretations to harmonize a later federal law with an earlier state regulation), but instead to give a federal statute its most reasonable construction and allow it to displace whatever state law it contravened when so construed. See Nelson, *supra*, 86 VA. L. REV. at 232, 235-44, 291-303. The *non obstante* form of the Supremacy Clause, then, confirms the Framers' plan to vest responsibility for interpreting and enforcing the Supremacy Clause in the judiciary. *Id.* at 232, 245-64. In light of this history, there is no merit whatsoever to the repeated suggestion of petitioners' *amici* that there is something illegitimate or questionable about the role of federal and state judges in deciding issues of implied conflict preemption under the Supremacy Clause.

B. This Court Has Long Recognized Obstacle Preemption, Which Serves An Important Function Distinct From Other Forms Of Conflict Preemption

As noted above (at pages 2-3 & n.2), this Court has elucidated the meaning of the Supremacy Clause and the doctrine of implied conflict preemption in a long line of cases stretching back almost 200 years. Although the doctrine of obstacle preemption has roots in the Court's early cases, the current *test* for obstacle preemption originated in *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), a 70-year-old precedent that petitioners' *amici* describe as "relatively recent[]" (AAJ Br. 10).

This Court's decisions leave no doubt that obstacle preemption is an "articulation of the meaning of the Supremacy Clause" itself. *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971). Illustrative is *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), where Chief Justice Marshall explained that, by virtue of the Supremacy Clause, "the government of the Union, though limited in its powers, is supreme within its sphere of action," so that duly enacted federal statutes must prevail over contrary state laws. *Id.* at 405-06, 425-26, 432, 436. Accordingly, the Court held, the State of Maryland could not exercise its general power to tax in a manner that would destroy, impede, or burden the operation of a specific agency created by a valid federal law (the Bank of the United States). *Id.* at 425-37. As Chief Justice Marshall explained in language suggestive of obstacle preemption, "It is of the very essence of [federal] supremacy, to remove all *obstacles* to its action within its own sphere, and so to modify every power vested in subordinate [state] governments, as to exempt its own operations from their . . . influence." *Id.* at 427 (emphasis added).

As explained above (at 12-13), this Court in *Geier* and other cases has repeatedly rejected the argument that it should draw distinctions between the various types of conflict preemption. The Court's repeatedly unwillingness to do what *amici* request – create a hierarchy of theories of conflict preemption – is perfectly understandable. To begin with, conflicts and inconsistencies between federal and state law take on myriad forms that are difficult to capture in a single verbal formulation. In addition, obstacle and impossibility preemption each serve a vital function in our constitutional scheme. Impossibility preemption addresses the narrow class of situations where both federal and state law impose mandates on a regulated party – and it is simply not possible to comply simultaneously with both mandates. See R. FALLON, JR., D. MELTZER, & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at 725 (5th ed. 2003) ("impossibility" preemption cases are "easier but far rarer" than cases involving ordinary conflict preemption). If the federal government commands a citizen to do X and a state law requires a citizen *not* to do X (or makes doing X a crime), there is no way to comply with both the federal and state requirements. In that circumstance, the state command must yield. See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 10, 16 (1984) (Congress's decision to "mandate[] the enforcement of arbitration agreements" preempts California's mandate that such agreements be invalidated in certain situations).

But federal laws and regulatory regimes can be severely undermined and even destroyed even in the absence of such diametrically opposed commands or requirements. For example, if Congress passes a law guaranteeing the right of all workers to join a union,

and a State makes it a felony offense to join a union, it is *not impossible* to comply with both laws; by declining to exercise the federally created right, a worker can easily comply with both laws. But the state law in this scenario so clearly undermines and burdens the federal right to join a union – and frustrates the purpose of the federal statute, which is to safeguard the right to join a union and perhaps to encourage union membership – that it obviously cannot stand under the Supremacy Clause.

Indeed, this Court has routinely applied obstacle preemption even when the burden imposed on federal rights was far less dramatic than in this hypothetical example. For example, in *Felder* v. *Casey*, 487 U.S. 131 (1988), the Court ruled that 42 U.S.C. § 1983 preempted a Wisconsin notice-of-claim statute that required a civil rights plaintiff to provide written notice (at least 120 days before filing suit) to putative government defendants of the circumstances giving rise to her constitutional claims, the amount of the claim, and her intent to bring suit. In the absence of such notice, the Wisconsin law required the state courts to dismiss the plaintiff's Section 1983 lawsuit. Writing for the Court, Justice Brennan explained that the Wisconsin statute was barred under the doctrine of obstacle preemption because, among other things, it "burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in the federal courts." *Id.* at 141; see also *id.* at 138, 144-45.

That conclusion necessarily depended on a robust doctrine of obstacle preemption, because it plainly was not impossible to comply with both the Wisconsin statute and the requirements of Section 1983. As *Felder* illustrates, the doctrine of obstacle preemption plays a

vitally important role – and a role that complements impossibility preemption – in ensuring the supremacy and full effectiveness of *all* federal laws against incursions and encroachments by the States.

C. The Criticisms Of Obstacle Preemption Advanced By Petitioners And Their *Amici* Are Unfounded

Petitioners' *amici* urge the Court to either repudiate obstacle preemption (and overrule cases like *Felder*) or collapse it into impossibility preemption notwithstanding (a) obstacle preemption's deep roots in the Supremacy Clause and this Court's decisions, (b) the Court's traditional unwillingness to differentiate between types of federal-state conflicts triggering operation of the Supremacy Clause, and (c) the vitally important but distinct roles played by obstacle and impossibility preemption in protecting the national government and federal laws. These arguments seek to take advantage of views expressed by some Members of this Court (and some legal scholars) about perceived uncertainties relating to obstacle preemption. For example, the dissenters in *Geier* referred to "our potentially boundless . . . doctrine of implied conflict pre-emption based on frustration of purposes" and expressed concern that obstacle preemption vests too much discretion in "unelected federal judges." 529 U.S. 861, 894, 907 (Stevens, J., dissenting). See also REPORT OF THE APPELLATE JUDGES CONFERENCE, AMERICAN BAR ASS'N, THE LAW OF PREEMPTION 38 (1991) (obstacle preemption "demands a high degree of judicial policymaking").[8]

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[8] The principal author of the ABA Report has explained that his views on the doctrine of preemption have changed in response to fundamental changes in the legal landscape that have occurred

These criticisms of obstacle preemption are unfounded. To begin with, obstacle preemption builds on and implements the Court's general, well-settled methodology for resolving conflict preemption issues. "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes" – federal and state – "and then determining the constitutional question whether they are in conflict." *Perez*, 402 U.S. at 644. Not only are these familiar tasks that the judiciary is uniquely suited to undertake, but they hardly give to judges a blank check. For example, in conducting the conventional inquiry into statutory meaning, a federal court is bound by the authoritative construction given to the relevant state law by the State's courts. *Ibid.* Moreover, "[t]he relative importance to the State of its own law is *not material* when there is a conflict with valid federal law," and thus need not be weighed by a judge, "for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Fed. Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (emphasis added) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)).

To be sure, the judicial decision as to exactly when the tension between state and federal laws rises to the level of a "conflict" is undeniably a matter of judgment. See *Crosby* v. *National Foreign Trade Council*, 530 U.S.

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since 1991. See Kenneth Starr, *Preface*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS xi, xv (R. Epstein & M. Greve eds. 2007); see also *id.* at xvi (suggesting that Congress "cannot possibly police and redress every improper incursion on federal authority by legislative, executive, and judicial branches of all 50 state governments" and concluding that, "[i]f that job is to be done at all, it must be the federal judiciary that does it"). Cf. AAd Br. 12; PJ Br. 34 n.14.

363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]"). The critical question in every case (as in this case) is the extent of the inconsistency between state and federal law and whether that amount is sufficient, under the Supremacy Clause, to trigger conflict preemption. But as *Geier* made clear, such constitutional-law judgments do not require courts to "calculate the precise size of the 'obstacle[]'" based on "incentive or compliance considerations" that might be speculative or uncertain. 529 U.S. at 882. In any event, the same types of judgments are required for other forms of implied conflict preemption.

True, obstacle preemption can require judges to identify the congressional or regulatory "purpose" that allegedly is being thwarted by state law. That task, however, is hardly "open-ended" and completely "subjective," as *amici* suggest. AAJ Br. 3, 10, 12. On the contrary, it is quite familiar to judges who routinely engage in the interpretation of statutes and regulations based on traditional legal materials and sources. Furthermore, Congress (and administrative agencies) often declare their purposes explicitly in a statute or regulation or in the accompanying legislative or regulatory materials. At bottom, the inquiry into "purpose" is no less subjective than the inquiry into Congress's "intent," which *amici* acknowledge is the touchstone of the preemption analysis. AAJ Br. 9.

Beyond that, courts' judgment calls about the degree of inconsistency between state and federal law involve no more discretion than a wide array of other decisions made by federal and state judges every day. The law is filled with broad concepts – reasonableness, probable cause, excusable neglect, good cause, ordinary

care – that call for the judicial exercise of judgment. And whatever uncertainty and judgment calls might exist in other cases, this case involves a straightforward and direct conflict: a federal regulation explicitly grants manufacturers the freedom to choose one of two design options, the federal agency twice refused to eliminate that option for rear aisle seats, and there is overwhelming evidence that the federal rule at issue was intended to serve federal objectives under the Safety Act that would be severely undermined by state tort actions such as petitioners'. As Justice Thomas has suggested, "if federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both by electing to refrain from the covered behavior." *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1209 (2009) (Thomas, J., concurring). In such cases, as here, there is a "direct conflict" between federal and state laws. *Ibid.*

In any event, as explained above, the Supremacy Clause was meant to be *enforced by the courts* (in contrast to the rejected congressional negative, which Congress itself would have deployed). Federal courts are thus the institutions entrusted by the Constitution with the authority to police incursions by the States on the supremacy of federal law. For all of these reasons, this Court should reject *amici*'s request to either abandon obstacle preemption or severely weaken the settled protections of implied preemption.

Finally, we note that petitioners' *amici* are also wrong to lay the blame for the rise in implied preemption cases generally at the feet of a supposedly activist judiciary. PJ Br. 26-27. The causes are more basic and structural in nature. During the last century

(and particularly since the New Deal), in response to fundamental changes in the national economy, there has been a significant expansion of federal law and of the activities of the national government. This includes Congress's creation of dozens of expert, specialized administrative agencies to oversee – and often to comprehensively regulate – complex and important facets of the economy.

By virtue of the Supremacy Clause, the inevitable consequence of this expansion of federal authority has been to increase the likelihood of conflicts with the laws and regulatory efforts of state and municipal governments. *New York* v. *United States*, 505 U.S. 144, 159 (1992) ("As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted."). The risk of conflict is further enhanced by the existence, at last count, of approximately 87,525 local governmental units in the United States, including more than 3,000 counties, more than 19,000 municipalities, and more than 16,000 towns or townships. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 262 (2004). In light of the proliferation of subordinate government units, and the expansion of federal authority, it should come as no surprise that issues of conflict preemption arise with great frequency today.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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In The
Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,
Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*,
Respondents.

On Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Three

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safe-guards guaranteed by our Constitution.

CAC assists state and local officials in upholding valid and democratically enacted measures and historic common law remedies. CAC filed an *amicus* brief in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); over the last decade, CAC's predecessor organization, Community Rights Counsel, filed *amicus* briefs in preemption cases before this Court in support of many state and local laws.

CAC seeks to preserve the careful balance of state and federal power established by the Constitution and its Amendments. CAC thus has a strong interest in this case and the development of preemption law generally.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Under the text and history of the Constitution's Supremacy Clause, federal law trumps state law only to the extent a state law or remedy directly contradicts a valid federal enactment. This direct conflict can arise either because the federal law contains language expressly preempting state law or because it would be infeasible to comply with both federal law and the state law or remedy.

The Motor Vehicle Safety Act expressly preempts certain state statutes and regulations relating to safety standards, 49 U.S.C. § 30103(b)(1), but does *not* expressly preempt state-law damages actions, such as the common-law remedy sought by the Williamsons. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867-68 (2000). Accordingly, this case falls under the second, "implied preemption" category.

Under this Court's implied preemption precedent, the California Court of Appeal clearly erred in finding the Williamsons' damages action preempted. *See Williamson v. Mazda Motor Co.*, 167 Cal. App. 4th 905, 913-14 (2008). From *Geier* to *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), the Court has required a more direct conflict than is present in this case before displacing state law. This restrained approach to implied preemption accords with the text and history of the Constitution. *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

Because the relevant 1989 Federal Motor Vehicle Safety Standard for rear-seat active restraints set a minimum floor rather than a regulatory ceiling, Mazda could have complied with both the federal safety standard and the more stringent standard of safety imposed by the California jury. As demonstrated by the Court's holding in *Geier* and its subsequent implied preemption decisions in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), and *Wyeth*, the National Highway Traffic Safety Administration's rear-seat safety belt Standard 208 does not meet the standards that the Supreme Court has set for establishing implied preemption.

ARGUMENT

I. THE TEXT AND HISTORY OF THE CONSTITUTION'S SUPREMACY CLAUSE SUPPORT IMPLIED PREEMPTION ONLY WHERE THERE IS A DIRECT CONFLICT BETWEEN FEDERAL AND STATE LAW.

The Constitution's text and history support implied preemption only in circumstances where there is a direct conflict between a state law or remedy and federal law. The Supremacy Clause of the Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the

> supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. The Court has applied the Supremacy Clause to preempt state laws that conflict with federal law. *E.g., Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984) (explaining that federal preemption occurs "by direct operation of the Supremacy Clause").

The text of the Supremacy Clause makes "supreme" the "*Laws* of the United States made in Pursuance [of the Constitution]." U.S. CONST. art. VI, cl. 2 (emphasis added). Accordingly, displacing state law for broad, implied purposes or general policy reasons is contrary to the clear text of the Clause. Article VI allows preemption of state law only by enacted federal *law*, which requires express agreement among two legislative houses and two democratically-elected branches of government. *See* U.S. CONST. art. I, § 7; *INS v. Chadha*, 462 U.S. 919, 951 (1983) (holding that courts may not give effect to law that did not follow the "single, finely wrought and exhaustively considered, procedures" specified in the Constitution); *see also Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring in the judgment) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed.").

This is no mere formality: by providing for federal preemption only when required by duly enacted law, the Constitution ensures that the states' interests and federalism concerns are considered. The provision of equal state representation in the Senate in Article I, § 3, represents "a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty." THE FEDERALIST No. 62, 408 (James Madison) (B. Wright ed., 1961); *accord* THE FEDERALIST No. 43, *supra*, 315 (James Madison). To permit displacement of state law under a broad theory of implied preemption risks denying states their main "protect[ion] . . . from [federal] overreaching" and would circumvent "the principal means chosen by the Framers to ensure the role of the States in the federal system." *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550-51 & n.11 (1985) (citing, *inter alia*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)); *see also id.* at 556 ("[T]he built-in restraints that our system provides through state participation in federal governmental action . . . . ensures that laws that unduly burden the States will not be promulgated.").

In addition, the Framers intended the Supremacy Clause to serve an important function in establishing the relationship between the federal government and the individual states in our Constitution's new federalist system. As James

Madison noted, because the Articles of Confederation lacked a federal supremacy rule, "'[w]henever a law of a State happened to be repugnant to an act of Congress,' it 'will be at least questionable' which law should take priority, 'particularly when the latter is of posterior date to the former.'" James Madison, *Vices of the Political System of the United States* (Apr. 1787) 9 PAPERS OF JAMES MADISON 345, 352 (Robert A. Rutland & William M.E. Rachal eds., 1975). While the Supremacy Clause altered the substance of what was essentially a conflict-of-laws rule of temporal priority, making valid federal law supreme over a subsequently enacted state law, it did not affect its domain: both the traditional rule and its constitutional successor "come[] into play only when courts cannot apply both state and federal law, but instead must choose between them." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 251 (2000). *See also* Viet D. Dinh, *Reassessing the Law of Pre-emption*, 88 GEO. L.J. 2085, 2087-88 (2000) (describing the Supremacy Clause as a "constitutional choice of law rule . . . that gives federal law precedence over conflicting state law").[2]

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[2] The Supremacy Clause also gave structure to our constitutional federalism by ensuring that valid treaties and federal statutes would be treated by the states as part and parcel of their own law, and not as the law of a foreign sovereign. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1510 (1987); *see also* Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 559 (2003). This aspect of the Supremacy Clause corrected deficiencies in the Articles of Confederation, which granted law- and treaty-making power to the United States Congress, but failed to make clear that these acts were

In other words, the Supremacy Clause was only intended to kick in when courts could not apply both federal and state law together.

Describing what the text of the Constitution provides with respect to preemption, Professor Nelson summarizes the meaning of the Supremacy Clause as follows:

> Taken as a whole, the Supremacy Clause says that courts must apply all valid rules of federal law. To the extent that applying state law would keep them from doing so, the Supremacy Clause requires courts to disregard the state rule and follow the federal one. But this is the extent of the preemption it requires.

Nelson, 86 VA. L. REV. at 252. In sum, the Constitution's Supremacy Clause established the appropriate hierarchy of substantive law, but was not intended to displace state law that could co-exist with its federal counterpart.

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automatically effective in the States. James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 PAPERS OF JAMES MADISON 345, 352 (noting that in general "the acts of Cong[res]s [under the Articles of Confederation] . . . depen[d] for their execution on the will of the state legislatures").

II. SUPREME COURT PRECEDENT SETS AN APPROPRIATELY HIGH BAR FOR IMPLIED FEDERAL PREEMPTION.

As Chief Justice John Marshall observed, "[i]n our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 204-05 (1824). This Court has developed preemption doctrines in order to assess and resolve these contests in light of the Supremacy Clause. U.S. CONST. art. VI, cl. 2.

The Supreme Court has observed that the Motor Vehicle Safety Act, which is at issue here, only impliedly preempts state common law when it "actually conflict[s]" with the federal statute and its regulations. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (citing *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)). This "actual conflict" rule is in harmony with the Constitution's text and history, as discussed above. In the instant case, the California Court of Appeal's broad interpretation of *Geier*, however, impermissibly shifts the doctrine's standard away from actual conflict toward a lower threshold.

As Professor Nelson has recognized, the definition of the words underpinning our understanding of the implied preemption doctrine has changed over time, leading in some cases to the

erroneous assumption that the preemption threshold is lower than originally intended. Notably, this Court in *Gibbons v. Ogden* held that state laws should be preempted when they "interfere" with federal law. *Gibbons*, 22 U.S. (9 Wheat.) at 205. Professor Nelson has argued that interference had a different meaning to the Court in 1824, and does not suggest a broad theory of implied preemption:

> In the language of the day, "to interfere" could mean "to clash." Marshall's contemporaneous opinions frequently used the word in this sense; two things were said to "interfere with" each other when they were mutually exclusive or contradictory. In *Gibbons*, both the Court's ultimate holding and the context of the relevant passage indicate that Marshall had this meaning in mind.

Nelson, 86 VA. L. REV. at 267-68.

The Court's explication of its preemption doctrine in *Gibbons* supports Nelson's conclusion. Chief Justice Marshall wrote that:

> Since, however, in exercising the power of regulating their own purely internal affairs . . . the States may sometimes enact laws, the validity of which depends on their *interfering with, and being contrary to,* an act of Congress passed in pursuance of the [C]onstitution, the Court will enter upon the inquiry, whether the laws . . . have . . . come

> *into collision* with an act of Congress, and deprived a citizen of a right to which that act entitles him.

Gibbons, 22 U.S. (9 Wheat.) at 209-10 (emphasis added).

The Court considered "interference" to be synonymous with "collision" and "contrary to," which suggests that preemption only occurred when state and federal law stood in opposition to each other on the same issue. The Court has emphasized this high standard in subsequent cases, including in *Hines v. Davidson*, 312 U.S. 52, 67 (1941).

In *Hines*, the Court reviewed the language it had used to describe when state law should be preempted: "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Id.* The words with which "interference" is grouped validate this high standard; all suggest that the conflict between the state and federal laws must be actual and of serious consequence in order to trigger preemption. Even so, this Court in *Geier* recognized that the distinction between different articulations of implied preemption cannot be drawn easily; "varieties of 'conflict' . . . often shade one into the other." *Geier*, 529 U.S. at 874. In recognition of this, "[t]he Court has not previously driven a legal wedge – only a terminological one – between 'conflicts' that prevent or frustrate the accomplishment of a federal objective and 'conflicts'

that make it 'impossible' for private parties to comply with both state and federal law." *Id.* at 873.

Unfortunately, as lower courts began to hear implied preemption cases in the post-*Geier* era, it became clear that some courts were applying *Geier* more broadly than the Court intended. *See Carden v. Gen. Motors Corp.*, 509 F.3d 227 (5th Cir. 2007); *Sprietsma v. Mercury Marine*, 197 Ill. 2d 112 (2001). The Supreme Court corrected this course in *Spriestma v. Mercury Marine*, 537 U.S. 51 (2002), and again in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

Sprietsma concerned the Federal Boat Safety Act, which, like the National Traffic and Motor Vehicle Safety Act, authorized a federal agency to promulgate safety standards. The Coast Guard, tasked with promulgating the rules, considered but did not require motor boats to install propeller guards. After Petitioner's wife was killed in a boating accident, Petitioner sued Mercury Marine for failing to install propeller guards, but the trial court dismissed the case and the Illinois Supreme Court affirmed the dismissal, relying on an incorrect interpretation of *Geier*. *Sprietsma*, 197 Ill. 2d at 125-26. While *Geier* certainly was controlling precedent, the holding in *Geier* should have counseled rejection of the preemption argument. This Court granted certiorari and reversed, clarifying that:

> The Coast Guard's decision *not* to impose a propeller guard requirement presents a sharp contrast to the decision of the

> Secretary of Transportation that was given preemptive effect in *Geier v. American Honda Motor Co.* As the Solicitor General had argued in that case, the promulgation of Federal Motor Vehicle Safety Standard (FMVSS) 208 embodied an affirmative 'policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.'

Sprietsma, 537 U.S. at 67 (citations omitted).

The Court distinguished only the fact pattern in *Sprietsma* from the fact pattern in *Geier*. The implied preemption doctrine rules of *Geier* still controlled – a rule that (1) saved from preemption state common-law rules, unless the common law presented an actual conflict with the federal regulation, and (2) held that federal minimum standards do not conflict with state common-law rules that have more stringent standards. *Geier*, 529 U.S. at 867-69. The Coast Guard, in opting not to require propeller guards, created a minimum standard that a state common-law rule might exceed by requiring propeller guard installation. Therefore, under *Geier*, the Supreme Court corrected the lower courts and held that the Petitioner in *Sprietsma* prevailed against an early motion to dismiss based upon a preemption claim. *Sprietsma*, 537 U.S. at 70.

In *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), the Court again clarified the limited circumstances in which implied preemption may displace state law

or remedies. Applying *Geier*, the *Wyeth* Court distinguished the regulatory floor set by the Food and Drug Administration (FDA) for drug labels from the "variety and mix of devices" that the Department of Transportation sought in the regulation at issue in *Geier*. *Id.* at 1203 (citing *Geier*, 529 U.S. at 881). The Court held that no such conflict presented itself in *Wyeth*: although the FDA set reporting and labeling requirements for prescription drugs, its approval of a drug label did not preempt a state common-law tort claim that a patient was not adequately warned of the drug's risks. This Court observed that the FDA had never suggested that "state tort law stood as an obstacle to its statutory mission," *Wyeth*, 129 S. Ct. at 1202, and that the labeling requirement established only minimum standards. *Id.*

So, too, here. Under this Court's longstanding preemption precedents, including *Geier* and *Wyeth*, the Williamsons' common-law action against Mazda Motor for failing to install an appropriately safe seatbelt in the Williamsons' minivan is not preempted. The United States' *amicus curiae* briefs filed in this case and in *Geier* support this proposition. Contrary to the lower court's ruling that *Geier* requires preemption in this case, the United States' position in both *Williamson* and *Geier* illustrates that *Geier* does not, in fact, mandate preemption here.

Although the United States supported preemption in its *amicus curiae* brief in *Geier* and has opposed preemption in its brief in support of granting certiorari in the instant case, both these

briefs articulate a narrow view of implied preemption. *Compare* Brief for the United States as *Amicus Curiae* at 11, 15, *Williamson v. Mazda Motor*, No. 08-1314 (2009), *with* Brief for the United States as *Amicus Curiae* Supporting Affirmance, at 6, 21, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (No. 98-1811). As the United States noted in its *Geier* brief, "state tort law does not conflict with a federal 'minimum standard' merely because state law imposes a more stringent requirement." U.S. *Geier* Brief, at 21.

The distinction between the fact patterns and regulatory history of *Williamson* and *Geier* is emphasized by comparing the United States' *amicus* briefs in the two cases. For example, in its *amicus curiae* brief in *Geier*, the government emphasized NHTSA's intent that car manufacturers offer a *variety* of passive restraint options in order to overcome public resistance to safety devices in cars, encourage ongoing research into restraint devices, and therefore improve car safety. It recognized that conflict preemption is necessary to avoid "actual" conflicts between federal and state law, and that the specific desire to create an assortment of gradually phased-in passive restraint options would actually conflict with a state judgment requiring a *particular* restraint. U.S. *Geier* Brief, at 10.

Indeed, the U.S. brief in *Geier* even presented a hypothetical, in which NHTSA's decision not to require the installation of anti-lock brakes would not preempt a state common-law rule that imposes liability on manufacturers that did not install anti-

lock brakes. *Id.* This hypothetical mirrors the facts in the instant case. According to the logic of *Geier* and the government's own interpretation of the implied preemption doctrine, NHTSA's decision not to require the installation of Type 2 seatbelts in rear inboard seats should not preempt a state common-law rule that imposes liability on manufacturers that did not install Type 2 seatbelts in the rear inboard seat.

* * *

Geier, *Sprietsma*, and *Wyeth* have together defined modern implied preemption doctrine. The limited nature of the implied preemption doctrine suggested in these cases accords with the text and history of the Supremacy Clause, which supports displacing state law or remedies only where they actually conflict with federal law. Because there is no actual conflict between the minimum safety standard for rear seatbelts in Standard 208 and the more stringent safety standard imposed in this case by the California jury, the Court should not impliedly preempt the state tort action pursued by the Williamsons.

CONCLUSION

For the foregoing reasons, the decision of the California Court of Appeal should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,

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Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

DRI – The Voice of the Defense Bar ("DRI") is an international organization comprised of more than 22,000 attorneys involved in the defense of businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys around the globe. Therefore, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system in America. DRI has long been a voice in the ongoing effort to make the civil justice system fairer and more efficient, and – where national issues are involved – consistent. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system.

DRI seeks to contribute to the Court's consideration of cases by offering its perspective when the experiences of its members may assist the Court in the decision-making process. DRI members represent federally-regulated businesses, often serving as national coordinating counsel for entities that manufacture products placed into the national stream of commerce. DRI members have extensive experience defending

1. In accordance with Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief, either in whole or in part, and that no entity or person, aside from amicus curiae, its members, and its counsel, made a monetary contribution to the brief's preparation or submission. All parties have granted a blanket consent to the filing of this brief and all other amicus curiae briefs, through letters on file with the Clerk's office.

federally-regulated businesses in state tort litigation. DRI members are regularly called upon to inform and advise business clients about the potential liability they face based upon state tort law, and to discuss the permissible bounds of conduct. DRI members are asked to offer counsel regarding the parameters of permissible conduct as established by state tort law and the sometimes conflicting substantive obligations and duties imposed under federal law and federal regulations. Federally-regulated businesses seek such advice as a guide to conduct. DRI members are therefore well-positioned to offer this Court practical insight based on first-hand experience with the impact of state tort litigation on manufacturers such as Mazda that may be of assistance in deciding the issues raised in this appeal.

As the only national membership organization devoted to representing the interests of lawyers defending businesses and individuals in civil litigation, the issue of preemption is of great importance to DRI. When state tort litigation results in judgments against a business based on a particular design, or the presence or absence of a particular feature on a product, that outcome becomes a part of the body of law used by DRI members to offer advice and counsel to their clients regarding potential exposure and actionable conduct. Practically speaking, if tort litigation results in huge judgments for the use of a particular kind of lock on a car door, or the selection of a particular foot pedal design, or the choice of a seatbelt and airbag configuration, those judgments establish a rule or standard of conduct that will guide future design decisions. DRI has a strong interest in assuring that the prevailing law on preemption furthers the federal

regulatory purposes as provided by Congress and affords potential civil defendants clarity about permissible conduct and its outer limits.

The preemption doctrine is intended to effectuate the supremacy of federal law by ensuring that state tort claims do not frustrate Congressional purposes. In *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861 (2000), this Court found that state tort litigation can frustrate the purpose of a federal statute or regulation. As determined in *Geier*, where Congress sought to encourage flexibility or design choice, preemption is necessary to ensure that state tort law does not undermine or frustrate that purpose. Absent a preemption doctrine that bars state tort litigation in these circumstances, businesses in virtually every federally-regulated industry will be exposed to the threat of potentially-debilitating state tort liability. Despite a Congressional purpose of fostering design choice, DRI's members will inevitably need to counsel their clients to avoid options that can be used as a basis for state tort liability. The result will be to foreclose numerous options or design choices despite a federal regulatory desire to encourage choice. DRI therefore has a strong interest in assuring that this Court adopts a preemption rule that is capable of consistent application across the country and that preserves a sphere of choice if a statute (or a federal regulation) reflects a Congressional purpose to allow for flexibility.

SUMMARY OF THE ARGUMENT

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 ("Safety Act") in an effort to establish uniform safety standards for the design and production of motor vehicles. The Safety Act contains an express preemption clause declaring that "[w]hen a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter." 49 U.S.C. § 30103(b)(1). The Safety Act further contains a "savings clause" providing that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

This Court has interpreted the Safety Act to preempt state tort claims that frustrate Congressional purpose and run afoul of federal standards. *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861 (2000). In so doing, the Court has been careful to note that state tort judgments carry the effect of regulatory mandates that establish affirmative standards of conduct as effectively as legislation or administrative standards. Now, the Court is faced with another state tort claim seeking to do precisely that – create an affirmative standard of conduct that conflicts with federally-adopted standards and frustrates the flexibility the National Highway Traffic Safety Administration ("NHTSA") specifically provided for.

Disrupting the careful balance sought by Congress through the imposition of state tort liability will strip certainty from the state civil defense arena. Where, as here, NHTSA sought to preserve several options for rear seat restraint and safety design, the failure to impose preemption will unsettle the law, and impede federal regulatory purposes. Federally-regulated entities will be forced to make design and manufacturing decisions and otherwise conduct business in an environment where they are unable to predict their potential liability exposure. Differences in legal standards between individual states, and among the states themselves, will create varying and possibly inconsistent standards of conduct that will cause national manufacturers tremendous difficulty. Due to the retroactive nature of state tort liability, even the most prudent of defendants will be unable to insulate themselves from common law litigation. As a result, defendants may shy away from the design of new and better products where the risk of liability outweighs any benefits. Accordingly, this Court should affirm the lower court's decision and squarely hold that FMVSS 208 preempts petitioners' state-law tort claim.

ARGUMENT

PREEMPTION IS NECESSARY TO PROTECT THE DELIBERATE POLICY CHOICE EMBODIED IN NHTSA'S FMVSS 208, WHICH GAVE MANUFACTURERS FLEXIBILITY REGARDING THE TYPE OF SEATBELT TO USE IN REAR AISLE AND CENTER SEATS, AND TO PREVENT STATE TORT JUDGMENTS FROM OPERATING AS CONFLICTING REGULATORY MANDATES FRUSTRATING THE CONGRESSIONAL PURPOSE.

No matter what different approaches the Court has previously taken to determine whether a common law claim is preempted by federal law, it has agreed that the touchstone of preemption is first, and foremost, Congressional intent. *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 884 (2000); *Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Intent can take several forms. It may be "express," when Congress specifically includes in legislation a provision addressing that legislation's preemptive scope, or implied, when Congressional intent is not so expressly defined. In order to pay proper credence to Congressional intent, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," must be preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In determining whether state law claims are preempted, this Court has long recognized the impact

of state tort decisions in federally-regulated areas. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *San Diego Bldg Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *Savage v. Jones*, 225 U.S. 501, 533 (1912). A common law tort action establishes affirmative standards of conduct as effectively as legislative or administrative standards. As a result, state tort law, not federal legislation, will guide defendants' manufacturing, design, and business decisions, if defendants are no longer able to rely on the preemption doctrine to bar common law tort claims. In *Geier*, the Court held that state tort claims that would "frustrate the accomplishment of a federal objective" are preempted. *Geier*, 529 U.S. at 873. Absent preemption here, the potential for state tort verdicts will leave manufacturers unable to predict with any degree of certainty their potential liability exposure. As a result, the federal purpose of providing for flexibility regarding Type 1 and Type 2 seatbelts in rear and aisle seats will be lost. Accordingly, preemption is necessary to achieve the federal purpose.

A. Common law tort actions and judgments create regulatory mandates and prohibitions that frustrate a congressional purpose to permit choice or flexibility.

This Court has previously recognized the importance of limiting liability imposed by state tort law principles where it would amount to a regulatory mandate frustrating Congressional purposes. The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et. seq.*, is one example. The Act includes a provision which states that if cigarette packages carry

the statutorily mandated health warning, "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes..." 15 U.S.C. § 1334(b). Although this preemption provision clearly prohibited individual states from imposing additional mandatory labeling or advertising requirements, for many years legal commentators took the opposite view on the theory that the terms "requirement" and "prohibition" may not bar liability imposed by state tort law principles. See Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 Md. L. Rev. 1210, 1227 (1996). This Court resolved the issue in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), when it determined that the petitioner's state failure-to-warn claim was preempted to the extent it "required a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly tested, warnings." *Id.* at 524. The *Cipollone* Court reasoned the petitioner's common-law damages action was "premised on the existence of a legal duty, and it is difficult to say that such actions do not impose 'requirements or prohibitions.'" *Id.* at 522.

Cipollone is but one of numerous cases where this Court has, in the course of performing its preemption analysis, confronted arguments that jury verdicts pursuant to common law claims do not establish regulations, standards, or requirements and, thus, are not preempted by federal statutes or administrative regulations. *See, e.g., CSX Transp., Inc v. Easterwood*, 507 U.S. 658 (1993); *International Paper Co v. Ouellette*, 479 U.S. 481 (1987). *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Asahi Metal Indus. Co. v. Superior Court*,

480 U.S. 102, 114-15 (1987). In each of these cases, this Court concluded that common law actions, whether grounded in federal or state law, established affirmative standards of conduct that modify behavior effectively as legislative or administrative enactments. *Medtronic*, 518 U.S. at 510 11 (O'Connor, J., concurring joined by Rehnquist, Ch. J., Scalia and Thomas, JJ.; *id.* at 504 (Breyer, J. concurring); *Cipollone*, 505 U.S. at 522-23; *Ouellette*, 479 U.S. at 495.

More recently, in *Geier*, 529 U.S. 861, the Court reiterated that state tort judgments may create affirmative standards of conduct by which defendants must comply with or be subject to liability, regardless of defendants' compliance with federal law. In *Geier*, the Court observed that a state verdict in the petitioner's defective design claim would create a "jury-imposed safety standard" that actually conflicted with the federal safety standards set forth in FMVSS 208. *Id.* at 871. Accordingly, the common law action was preempted, not by the express preemption provision of the National Traffic and Motor Vehicle Safety Act, but by the actual conflict between the common law action and the Department of Transportation standard requiring manufacturers to place driver's side airbags in some, but not all, of 1987 automobiles.

To the extent petitioners' amici suggest that preemption is inappropriate when the regulatory impact of a state tort judgment is diminished or altogether eliminated by the state court's ambition to compensate rather than regulate, this argument is unpersuasive. "It is the *effect* of the state action, not its *purpose* which determines if it is preempted." Timothy Walton and

Richard P. Campbell, *Effect of Federal Safety Regulations on Crashworthiness Litigation*, 22 Tort & Ins. L. J. 554, 564 (Summer 1987) (emphasis in original). The effect of state tort judgments on individual and business defendants is identical regardless of the purpose for which state tort liability is sought. Stated differently, even if the moving force behind a state tort claim is to compensate for injuries rather than to further standardize a federally-regulated area, requiring a business to pay remuneration is tantamount to developing a regulatory scheme. This Court observed this point in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-247 (1959), when it stated:

> Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively asserted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

The *Garmon* Court specifically recognized the regulatory effect of a tort judgment, namely, that it may cause a conflict with federal law. 22 Tort & Ins. L. J. at 563. Indeed, this endeavor to limit the regulatory impact of a state tort judgment supported the *Garmon* Court's

determination that a state law tort claim for damages caused by a union's picketing was preempted by the National Labor Relations Act. 359 U.S. at 246-248.

The potential impact of state tort judgments on defendants can be whittled down to a single statement: state tort judgments may make conduct actionable that was otherwise permissible. When the federal government, through an expert agency, provided for flexibility in design choices, as NHTSA did here through the passage of FMVSS 208, state tort law cannot be permitted to override that Congressional purpose. Accordingly, when a successful state common law action effectively establishes a "standard" which interferes with or stands as an impediment to the implementation of a comprehensive federal regulatory plan, the action must be preempted to avoid inherent inconsistency. See, e.g., *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Ouelette*, 470 U.S. at 494; *Geier*, 529 U.S. at 871.

B. The mandates imposed by state tort judgments leave federally-regulated entities with no clear guide as to how to conform their conduct to the law, exposing businesses to unpredictable liability that may thwart necessary product innovation and will interfere with appropriate design choices that NHTSA intended to permit.

When the federal government, through Congress or an administrative or regulatory agency, establishes a comprehensive scheme for the regulation of specific conduct, persons or entities subject to those regulations must be able to understand the legal duties or requirements engendered. The ability to predict with

certainty liability exposure is of paramount importance to individual and business defendants, and is a driving force behind defendants' operating and production decisions. Here, through enactment of Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1987), NHTSA gave automobile manufacturers the flexibility to choose what type of seat belts to install in certain seating positions. In reliance on NHTSA's regulation, and the statutory language expressly signaling preemption of conflicting state regulations or standards, manufacturers have made design choices allowed by Congress and the federal agency assigned to implement the statute. Automobile manufacturers such as Mazda thus have a strong and legitimate reliance interest in the continued application of *Geier* where, as here, the regulation reflects a purpose of affording flexibility in design choice. This Court's refusal to follow *Geier* to preempt state tort claims predicated on the decision to require one of two permissible seat belt types will create enormous uncertainty. Lawyers counseling automobile manufacturers will be reluctant to suggest that manufacturers can depend on the ability to make design choices, even when a regulation appears to authorize the selected option. And manufacturers will therefore lose the benefit of a deliberate federal regulatory choice for several options to enhance Congressional objectives under the statute.

DRI members have a significant interest in a clear and consistent preemption doctrine so that they can properly advise their entity clients, which look to counsel to determine their legal obligations and the limits on design choices prior to liability exposure. If this Court eviscerates *Geier* and the long-standing rule that state

tort claims which frustrate Congressional purpose and conflict with federal law are preempted, attorneys will be unable to effectively do so. A major shift in *Geier*'s analysis, and in the scope of preemption, will create confusion. Furthermore, unpredictable and uncertain liability exposure may leave businesses hard-pressed to find affordable insurance to insulate them from unknown liability, thus driving up the cost of consumer products. Businesses may also be inclined to cease product innovation altogether to avoid costly state court liability they are wholly unable to predict. Only by adhering to a preemption rule that is capable of uniform application can these costly ills be dogged.

The National Highway Traffic Safety Administration ("NHTSA") relied on the original objectives of the National Traffic and Motor Vehicle Safety Act of 1966 ("the Act"), 15 U.S.C. § 1381, in deciding to preserve the option of allowing automobile manufacturers to install either Type 1 or Type 2 belts in rear center and aisle seating positions. The Act's goal was to reduce the number of traffic accidents and traffic-related injuries and deaths through the issuance of safety standards promulgated by the administrator of NHTSA that took into account technological ability and other economic considerations. 49 C.F.R. 1.50(a) (1994); 49 U.S.C. § 30111(a); H.R. Rep. No. 89-1776, at 16 (1966). Consistent with that objective, NHTSA gave manufacturers the flexibility to install Type 2 (lap/shoulder) belts insofar as they were able to eradicate the safety and technical issues prevalent in Type 2 belts, but did not require manufacturers to do so. 54 Fed. Reg. at 46, 258. This flexibility was intended because NHTSA concluded that competing safety considerations existed, design choices

about seatbelts would be affected by changing design and use of various child restraints, and some seatbelt design choices could have an unintended adverse impact on entry and exit from the vehicle as well as decreasing public acceptance and use of the seatbelts.

Permitting state-law variations where the federal regulatory standard has been established, as petitioners advocate, creates confusion and undermines the certainty and efficiency sought by Congress. *Ouellette*, 479 U.S. at 495-96. Regulated entities are left in a vulnerable position about whether to follow conflicting federal or state law, as they are unable to depend on the ability to make the specific choices that the federal government allowed for. Because of the need to limit liability exposure, state tort law will guide the manufacturing and design decisions of federally-regulated entities. In addition, if *Geier* is altered as some amici suggest, manufacturers will no longer be able to rely on the preemption doctrine applying in any given case. Attempting to keep abreast of individual state law requirements would impose an almost impossible task on national product manufacturers, where the diversity in legal standards applied in different states may result in "identical cases...produc[ing] startlingly different results." S. Rep. 105-32, at *4 (1997); *Geier*, 529 U.S. at 871 (noting that "the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when juries in different States reach different decisions on similar facts").

The uncertainty in the automobile industry that will surely follow if this Court decides to reverse will come at

great costs. M. Stuart Madden, a Pace University School of Law professor, emphasized that the "cacophony of conflicting state liability and damage rules" is costly to both business and the public. S. Rep. 105-32, at 4. According to Madden, unpredictability of potential state court liability accounts for high insurance costs in the United States, which are anywhere from fifteen to twenty times greater than in Japan and Europe, respectively. *Id.* Art Kroetch, chairman of a small South Dakota machine tool manufacturing business, agreed that high insurance rates are driven by the insurers' inability "to accurately predict potential liability due to the disparity in state laws, unpredictability of where the product will be located initially, and later where it is sold and resold as used equipment." *Id.* In some instances, insurance rates are so high that businesses are unable obtain affordable coverage. *Id.*

Another negative effect of uncertainty is not so easily quantified. As a result of the inability to predict liability exposure, the innovation of new and beneficial products may be thwarted. This phenomenon has been readily observed in the area of medical devices and drug manufacturing. See, e.g., *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 350 (2001) ("As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants-burdens not contemplated by Congress in enacting the FDCA and the MDA. Would-be applicants may be discouraged from seeking § 510(k) approval of devices with potentially beneficial off-label uses for fear that such use might expose the

manufacturer or its associates (such as petitioner) to unpredictable civil liability."); Margaret Gilhooley, *Innovative Drugs, Products Liability, Regulatory Compliance, and Patient Choice*, 24 Seton Hall L. Rev. 1481, 24 Seton Hall L. Rev. 1481, 1482 (1994) ("Presently, tort litigation and regulation by the Food and Drug Administration (FDA) provide these [safety] checks. Concerns have been raised, however, that the tort process, because of its uncertain standards, produces the unintended consequence of discouraging worthwhile innovation. Prescription drug manufacturers maintain that liability risks may cut into their innovative efforts."); Douglas G. Smith, *Preemption After Wyeth v. Levine*, 70 Ohio St. L.J. 1435, 1476-76 (2009) (noting that the costs "of unwarranted liability in appropriate circumstances...can be significant, preventing innovation and the development of pharmaceutical products that may have significant benefits.").

The same chilling effect would invade the automobile and other industries. Unpredictable exposure to state tort liability may chill automobile manufacturers from developing new systems in the important area of seatbelt and restraint design. To some extent, this is already occurring in other areas. S. Rep. 105-32, at *8-9 (noting that as of 1997, members of the Association for Manufacturing Technology (formerly known as the National Machine Tool Builders Association) spent seven times more money on product liability costs than on costs associated with research and development). If this Court permits individual states to impose liability on an auto manufacturer such as Mazda for doing just what NHTSA allowed it to do – as petitioners here argue – there is a perverse incentive for manufacturers to cease

innovation altogether. The threat of diminished innovation in the automobile industry due to uncertain state tort liability is particularly worrisome in today's climate, where environmental and climate changes have put the pressure on manufacturers to develop more fuel-efficient cars and trucks.

Where NHTSA has decided that the National Traffic and Motor Vehicle Safety Act provides for flexibility in automobile manufacture and design, as evidenced by FMVSS 208, state juries are not properly equipped to challenge those decisions. NHTSA and other expert agencies can easily conduct broad-based studies through the use of experts, hearings, and in-depth research, before passing federal standards and regulations. State courts trying to regulate through individual litigation do not have these tools. Although expert testimony is allowed in state tort actions, the testimony must be focused on relevant opinion testimony under state substantive law and evidentiary principles. Thus, it may not provide answers to the complex federal regulatory trade-offs that are embodied in a statute such as NHTSA. Most notably, juries are ill-equipped to evaluate overall regulatory policy or to determine whether a particular design choice is consistent with the outcome that Congress sought to achieve when it enacted legislation. Stated another way, a lay jury does not examine design choices from the broader perspective of the Safety Act; a jury conducts an exercise that is entirely retrospective, and looks at design choices from the perspective of their impact on a particular accident. Juries do not do well with the kind of polycentric balancing that NHTSA must do, when considering competing considerations inherent in

regulating a complex area such as automotive safety. Without preemption, state juries will be asked to do just that. Yet, juries notoriously fare poorly when attempting to adjudicate individual safety risks in the context of overall consumer benefits – quintessentially the kind of issue the NHTSA must confront every day. And many state tort regimes impose a rule or standard for liability that is based on a very different calculus from the purposes evident in a federal statute or regulation. In *Geier*, this Court recognized that the outcome of jury trials evaluating a product design under state tort law can frustrate Congressional intent and eliminate the options that NHTSA intended to permit. Laypersons applying state tort law cannot substitute for NHTSA, the expert agency congressionally delegated the role of meticulously balancing nuanced and sometimes competing nationwide goals. When a jury's view is substituted for NHTSA's deliberate choice, as petitioner encourages, a core aspect of the federal regulatory scheme – one critical to innovation – is lost.

Numerous amici have urged this Court to severely limit *Geier*, claiming it has been misapplied by lower courts and has resulted in confusion and inconsistent results. But *Geier* falls squarely within this Court's historic test for preemption. *Geier* applied the longstanding principle that when state tort law frustrates a Congressional purpose to allow flexible design choices, it will be preempted. To be sure, various lower courts have disagreed about whether other federal regulations preempt state tort law. Compare *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007) with *Lake v. Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 WL 891867, at *7 (Tenn.

Ct. App. Mar. 15, 2010). But these differences do not result from a weakness in *Geier* but stem from the difficulty of discerning the federal regulatory intent. Given the complexity of federal statutes and rules, such differences are inevitable. Some federal courts will read a statute or rule to evince a purpose of setting a minimum standard where others will read a maximum and still others may see a desire for options. But these occasional difficulties in discerning Congressional intent provide no warrant to upset longstanding preemption principles or to restrict the use of preemption to bar state tort litigation when it would frustrate the federal regulatory intent as discerned by the court.

Where federal law and state law conflict, federal law prevails. U.S. Const., Art. VI, cl. 2. Because state product liability common law decisions are akin to legislation in coercing manufacturers' behavior or enforcing public policy, these common law decisions can set standards that conflict with federal law. Such is the case here, where petitioners' product liability claim requiring automobile manufacturers to install Type 2 seat belts conflicts with Federal Motor Vehicle Safety Standard 208 allowing manufacturers the option to install either Type 1 or Type 2 seat belts in certain vehicle seats. As a result of the federal law, Standard 208 controls. Allowing claims like petitioners' to proceed gives individual state juries free reigns to decide the parameters of the law, which Congress has entrusted only to specifically-identified expert federal agencies. The reasoning for this is simple – they are the only agencies qualified to do so. State tort judgments that operate with the force of federal legislation upset the Constitution's hierarchy of laws and the civil justice

system's ability to function properly and efficiently. This case presents the Court with an opportunity to pay homage to the legislative intent that has served as this Court's cornerstone in deciding preemption cases over the last four decades. In so doing, only one conclusion can be reached. Petitioners' common law claim is preempted.

CONCLUSION

For the foregoing reasons, the DRI urges this Court to affirm the lower court's decision.

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DELBERT WILLIAMSON, ET AL.,
PETITIONERS,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to the
Court of Appeal of California, Fourth Appellate
District, Division Three

BRIEF OF THE GROCERY MANUFACTURERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AND LAWYERS FOR CIVIL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 ("Safety Act"), directs the Secretary of Transportation to "establish by order motor vehicle safety standards." Federal Motor Vehicle Safety Standard ("FMVSS") 208, 49 C.F.R. § 571.208 (1987), regulates occupant crash protection, including seatbelt requirements. From 1967 through the time period at issue in this case, FMVSS 208 gave automobile manufacturers the option of installing a lap-only or lap/shoulder belt in the rear inboard seating positions of vehicles. In 1984, the National Highway Traffic Safety Administration ("NHTSA") specifically rejected a proposal that FMVSS 208 be amended to require lap/shoulder belts in all rear seats, and in 1989 the agency reaffirmed that decision as to rear center/aisle seats. NHTSA's decision to give manufacturers the freedom to choose either a lap-only or lap/shoulder seatbelt in rear center/aisle seats was the product of a deliberate policy judgment intended to further the objectives of the Act, including safety, technical feasibility, cost, and public acceptance.

The question presented is whether the Safety Act or FMVSS 208 pre-empts State tort claims that an automobile manufactured in 1993 was defectively designed because it contained a lap belt—rather than a lap/shoulder belt—in a rear center/aisle seat.

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INTEREST OF *AMICI CURIAE*[1]

The Grocery Manufacturers Association ("GMA") is the largest association of food, beverage, and consumer product companies in the world. Its members employ more than 2.5 million workers in all fifty States, with United States sales totaling over $460 billion annually. GMA leads efforts to increase growth and productivity in the food and beverage industry, and also works to promote the safety and security of the Nation's food supply. The organization applies legal, scientific, and political expertise from its member companies to vital public policy issues affecting the industry, and speaks for food and consumer product manufacturers at the State, federal, and international levels on legislative and regulatory issues. The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty States. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to the United States' economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. The American Tort Reform

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Besides *amici curiae* or their counsel, the Civil Justice Reform Group made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief.

Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before State and federal courts that have addressed important liability issues. Lawyers for Civil Justice ("LCJ") is a national association of senior corporate and defense counsel supporting excellence and fairness in the civil justice system. It includes the support of the organized national defense bar which is composed of the DRI-Voice of the Defense Bar, Federation of Defense and Corporate Counsel, and the International Organization of Defense Counsel with a combined membership of over 20,000 defense practitioners from throughout the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners here and their *amici* question the continued vitality of the traditional principles of regulatory conflict pre-emption this Court explained and vindicated in *Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861 (2000). *Geier*, like this case, arose from regulations promulgated under the National Traffic and Motor Vehicle Safety Act ("Safety Act"). And *Geier*, like this case below, turned on the traditional, commonsensical proposition that administrative agency practice, consumer safety, and economic efficiency can all be enhanced by Congress authorizing "a single, uniform set" of federal "standards" pre-empting "*all* state standards" that actually conflict with federal regulations. *Id.* at 870-71, 872.

"Why," *Geier* asked rhetorically, "would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake?" *Geier*'s answer to that question—that "[s]ome such principle is needed," *id.*—remains logical and practically unassailable. For at least the last century, this Court has assumed that Congress would not want the law "to defeat its own objectives" so as to "destroy itself." *Geier*, 529 U.S. at 872 (citations and internal quotation marks omitted); *see also Adams Express Co. v. Croninger*, 226 U.S. 491, 507 (1913) (statute should not be interpreted "to destroy itself").

Petitioners here and their *amici* nonetheless assail *Geier*. Sometimes overtly and other times more subtly, they effectively request that federal law

in fact be permitted substantially to undermine its own objectives by allowing the survival of conflicting State law—so long as it is federal regulatory law that is destroyed and State common law that does the destroying. Specifically, Petitioners and their *amici* assail *Geier* by seeking permission for State trial-court juries to retrace and retroactively overturn the very same technical and economic determinations previously, painstakingly, and prospectively made by the responsible federal agency experts.

As demonstrated below, however, *Geier's* analysis remains convincing and workable, notwithstanding Petitioners' challenge. In particular, *Geier's* doctrinal explanations remain persuasive (*see* Section I.A, below); *Geier* can be readily applied to both health and safety and economic regulations (*see* Section I.B, below); *Geier* aligns nicely with the best international product liability practices (*see id.*), and *Geier* is strongly supported by the expansive understandings of conflict pre-emption held at Founding by, among others, Hamilton, Madison, and Marshall (*see* Section II.A, below). Nor is there merit to the recurring worries of Petitioners and their *amici* that a *Geier* conflict pre-emption analysis must be either crabbed and confined, or else unprincipled and unbounded. *See* Section II.B, below. Simply put, federal regulations should not be crimped or toppled merely because the disrupting agent happens to be a State court's judgment. Applying that commonsense holding from *Geier*, the Court of Appeal of California dismissed Petitioners' claims. This Court should now affirm that judgment.

ARGUMENT

In the interests, equally, of sound regulatory practice, the industries regulated by it, and the consumers who are its proper beneficiaries, Petitioners' invitation to upend settled conflict pre-emption doctrine should be declined.

I. TRADITIONAL PRE-EMPTION ANALYSIS IS A SETTLED AND VITAL COMPONENT OF OUR NATIONWIDE SYSTEM OF HEALTH, SAFETY, AND ECONOMIC REGULATION.

This Court's decision in *Geier v. American Honda Motor Co.* articulated with unusual clarity and cogency reason-based principles of federal pre-emption doctrine. Under *Geier*, State law, including State common law, retains its place. But *Geier* also gives the Constitution's Supremacy Clause its own proper scope of operation in those cases of actual, demonstrable conflict between the plain terms of federal regulatory standards and the potentially competing requirements of State common law liability rules. That full scope of operation is essential if federal regulatory law is to be squared with legal rationality, economic efficiency, and the best international practices.

A. Traditional Pre-emption's Vindication In *Geier* Ensured That Administrative Regulations Are Given Proper Pre-emptive Force.

Geier crystallized various pre-existing strands of federal pre-emption analysis in the context of administrative agency regulations. Without pre-emptive force, national regulatory regimes cannot

function effectively, and nationally regulated manufacturing companies cannot produce goods efficiently. Without *national* regulation that pre-empts conflicting State tort rules, Congress and federal agencies would simply be unable "to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many [regulatory] cooks might otherwise create." *See Geier*, 529 U.S. at 871.

Enter the *Geier* Court. Drawing on what it repeatedly called "ordinary pre-emption principles," *id.* at 870, *Geier* painstakingly explained how traditional conflict pre-emption ought properly to work in the context of administrative agency regulations. Three of *Geier's* now-canonical conclusions bear special emphasis.

First, *Geier* makes clear that State trial-court juries and the damages they can award impose a form of regulation that might well conflict with federal law. Prior to *Geier*, certain opinions of this Court were sometimes read to mean that common law liability awards were qualitatively different from States' positive law enactments in terms of their susceptibility to federal pre-emption. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487-90 (1996) (plurality opinion). *Geier* cut through the previous mixed signals and confusion to reach a firm conclusion that, in many situations, common law tort actions can vitiate agencies' "very ability to achieve [federal] law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect." 529 U.S. at 872. *Geier* explained that, although Congress *could* write a statute that

"tolerat[es] ... conflict that those principles would otherwise forbid ... there [was] no reason to believe Congress ha[d] done so" in the Safety Act. *Id.*

Second, *Geier* established that an *express* statutory pre-emption provision, even one coupled with a common law *saving* provision, neither precludes nor distorts *conflict* pre-emption under traditional Supremacy Clause principles. Before *Geier*, various opinions of this Court had inconclusively explored the interaction of express pre-emption provisions with so called "implied" conflict pre-emption. *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Cipollone*, 505 U.S. 504. Citing to canons of statutory construction, the *Cipollone* plurality opinion had speculated that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." 505 U.S. at 517. *Freightliner* later clarified that an express pre-emption provision does not "entirely foreclose[] any possibility of implied pre-emption." 514 U.S. at 288. But *Freightliner* then went on to state, "*Cipollone* supports an *inference* that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." *Id.* at 289 (emphasis added). At the same time, *Freightliner* declined to address whether and when a "saving clause" might absolutely foreclose ordinary conflict pre-emption of State common law. *Id.* at 287 n.3.

Geier cut through this confusion as well by invoking important doctrinal principles that apply broadly to pre-emption analysis. Although the Safety Act contains both an express pre-emption provision and a saving clause providing that

"compliance with" federal safety standards "does not exempt any person from any liability under common law," *see Geier*, 529 U.S. at 867-68 (quoting 15 U.S.C. § 1397(k) (1988) (alteration omitted)), *Geier* rejected a proposed "special burden" that would have placed a large thumb on the scale opposite any assertion of Safety Act pre-emption. *Id.* at 870-71. Here again, *Geier* reasoned logically, premising its analysis on an assumption that Congress would wish to see its enactments rationally and effectively applied. *See generally id.* at 869-71. *Geier* declared that, whether singly or together, an express pre-emption provision and saving clause "d[id] *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869 (emphasis in original).

Third, *Geier* establishes that structure matters greatly in evaluating the pre-emptive effect of regulatory enactments. *Geier* acknowledged that not all State common-law actions need be pre-empted by the Safety Act or its implementing regulations. When, for example, a car company's safety device is defectively manufactured or when, even absent a manufacturing defect, a device fails to work as intended in the field, then the Safety Act's saving provision precludes any possibility of a manufacturer successfully asserting a compliance-with-regulatory-standards defense. Here, for example, if Petitioners had alleged that the Williamson vehicle had been defectively manufactured or that Mrs. Williamson's seatbelt had failed to remain latched as intended at the time of the accident, federal pre-emption of State common law liability would not be appropriate. But those broad openings for the continued operation of State common law leave unanswered the pre-emption questions raised by Petitioners' actual

allegations. Those questions concern whether State common law can impose duties on automobile manufactures to design particular safety measures (in *Geier*, an airbag; here, a lap-and-shoulder-belt combination) into each and every one of their vehicles. To answer that question, the *Geier* Court analyzed the evolution and structure of the Safety Act's vehicle design and performance standards. The Court ultimately determined that the relevant regulations had been carefully framed to allow manufacturers to "*choose* among different passive restraint mechanisms," *Geier*, 529 U.S. at 878 (emphasis added), and that this express determination to allow manufacturers to make their own design choices disposed of the pre-emption question.

It is not necessary here to recount *Geier's* reasons for finding that allowing private design choice by manufacturers would serve the relevant regulations' underlying purposes. *Id.* at 875. Suffice to say that, as might be expected, different safety devices had different advantages and disadvantages. *Id.* at 877-78. The Court therefore took seriously the Department of Transportation's "deliberat[e]" intention to "provide[] the manufacturer with a range of choices among different" safety devices. *Id.* at 875. The agency's decision to adopt regulations that on their face expressly declined to impose a single design, while leaving open various options, was thus read as pre-empting contrary State law that attempted to dictate the private choices the agency had deliberately left open. In reaching its decision, *Geier* applied a sub-species of traditional conflict pre-emption that had not previously been so

well explained in the caselaw. *Id.* at 881 (explaining the nature of the conflict).

B. Application Of Traditional Conflict Pre-emption Principles Is Fully Appropriate In The Context Of Economic Regulation.

By emphasizing the nature and breadth of "ordinary pre-emption principles," even as applied to a statute with an express pre-emption provision and a savings clause, the *Geier* Court merely clarified and vindicated pre-existing pre-emption doctrine. Nonetheless, Petitioners and their *amici* contend the National Highway Traffic Safety Administration ("NHTSA") regulations at issue here—regulations that happen expressly to provide for a slightly different set of design options than those at issue in *Geier*—ought to be deemed distinguishable from the ones *Geier* analyzed. This hair-splitting view appears premised in turn on a view that regulations are somehow second-class pre-emption citizens, enjoying only diminished pre-emptive force, if drawn in significant part with cost considerations in mind. Pet. Br. 18-21. As demonstrated below, however, any such contention should be rejected.

As an initial matter, cost and safety considerations are not so easily segregated from one another. The lower the cost of new automobiles, for example, the higher new-vehicle sales will be, and the faster will be the fleet's turnover from less-safe older cars to more-safe newer cars. In this manner, lower cost means greater safety; the two considerations blend together at the margins, and attempts to disaggregate them are rendered largely artificial.

Significantly, this Court has rejected analogous attempts by pre-emption opponents to segregate health and safety concerns from "economic" concerns and make pre-emption analysis turn on such distinctions. In *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 373-74 (2008), the Court addressed the pre-emptive effect of the highway trucking provisions of the Federal Aviation Administration Authorization Act ("FAAAA"). There, the State of Maine defended its challenged regulations on grounds that they "help[ed] it prevent minors from obtaining cigarettes" and that federal law, while pre-empting State "economic" regulation, "does not pre-empt a State's efforts to protect its citizens' public health[.]" *Id.* This Court emphatically rejected the proffered distinction. It reasoned that, not only was there no basis in the Constitution or statute for such distinctions, "[b]ut it is frequently difficult to distinguish between a State's 'economic'-related and 'health'-related motivations[.]" *Id.* "'Public health' does not define itself," the Court noted, and, accordingly, creating a public health exemption from an economic pre-emption doctrine would lead only to multiplying confusions. *Id.* at 375. Petitioners here thus gain nothing by emphasizing that the relevant federal regulations are rooted in supposedly "economic" concerns as opposed to "public health" or safety.

This Court's precedents bear out the necessity of recognizing the pre-emptive force of federal economic regulations. To be sure, many of the Court's leading pre-emption decisions happen to have involved products, fact scenarios, or federal regulatory subject matters that present questions of potential or actual death or injury. *See, e.g., Wyeth v. Levine*, 129 S. Ct.

1187 (2009) (pharmaceuticals); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (cigarettes); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (medical devices); *Geier*, 529 U.S. 861 (seatbelts); *Lohr*, 518 U.S. 470 (medical devices); *Freightliner*, 514 U.S. 280 (trucks); *Cipollone*, 505 U.S. 504 (cigarettes).

But other leading cases involve statutes, fact patterns, and issues that are purely economic in nature. *See, e.g.*, *Rowe*, 552 U.S. 364 (trucking services); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (airline pricing and services). *Morales* and *Rowe* illustrate how pre-emptive effect must be robustly granted to federal economic regulations in order to forestall a "state regulatory patchwork" that is "inconsistent" with Congress's determination to leave particular economic decisions "to the competitive marketplace." *Rowe*, 552 U.S. at 373. Concededly, market deregulation provisions, unlike health and safety requirements, generate few sensational fact-patterns suitable for television's legal dramas. But federal statutes grounded in cost-benefit concerns that deliberately leave economic decisionmaking to private parties do not lose pre-emptive force on that account.

In particular, and perhaps most relevant here, pre-emption is often used to ensure that elastically defined economic "torts" grounded in State law—such as deceptive trade practices claims, false advertising claims, and consumer protection claims—do not undermine federal agency regulations. Only days ago, for instance, the United States Court of Appeals for the Eighth Circuit addressed a federal pre-emption defense under the Organic Foods Production Act ("OFPA"), 7 U.S.C.

§ 6501 *et seq.* *See In re Aurora Dairy Corp.*, ___ F.3d ___, 2010 WL 3564849 (8th Cir. Sept. 15, 2010). The defendant in that case, a federally certified organic dairy, had been sued under various State tort theories alleging that its advertising and labeling misrepresented how "organic" its products were. Like the Safety Act in *Geier*, the OFPA includes an express pre-emption provision but not one that applies to State tort suits. Nonetheless, *Aurora Dairy* properly relied on *Geier* for the proposition that traditional pre-emption principles might still apply. *Id.* at *6. Carefully applying those principles, the Eighth Circuit found that certain State law claims would indeed conflict with federal organic certification processes and were therefore pre-empted. *Id.* at *8-10. One more blatant attempt to end-run a federal licensing scheme was thereby headed off.

Similar outcomes appear in recent federal district court and State cases. In *In re PepsiCo, Inc.*, 588 F. Supp. 2d 527, 537 (S.D.N.Y. 2008), the district court relied on the history and structure of Food and Drug Administration ("FDA") labeling regulations to conclude that the FDA was not concerned with the source of commercial bottled water, but rather with its purification. The court therefore rejected plaintiffs' claim of deceptive business practices where a bottled water company had complied with labeling requirements under the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* *PepsiCo*, 588 F. Supp. 2d at 537-39. Likewise, in *Guidroz v. Champion Enters.*, No. 05-1148, 2007 U.S. Dist. LEXIS 77611, at *33-38 (W.D. La. Jan. 26, 2007) (unpublished), a case closely paralleling *Geier*, the court found conflict pre-emption of State products liability law where the

Department of Housing and Urban Development intended to provide builders of manufactured homes with a set of "federally authorized options" for exterior wall design and construction. And in *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 8-11 (Cal. 2004), the California Supreme Court relied on *Geier* and conflict pre-emption analysis to reject claims that sellers of nicotine replacement therapies were required by State economic tort theories to provide labeling different from the labeling approved by the FDA.

In short, while Petitioners and their *amici* contend that the broad principles of pre-emption doctrine should be framed to drive forward evolving standards of health or safety, federal conflict pre-emption does not operate exclusively, or even primarily, in the context of health and safety regulation. Under the Supremacy Clause, federal economic regulations are frequently in need of protection from State intrusions, and State economic torts are frequently in need of displacement by federal law.

If this court were nonetheless to read a discount factor for economic considerations into its Supremacy Clause jurisprudence, it would place our nation at a competitive disadvantage. The European Union, for instance, unabashedly recognizes that product safety concerns should be analyzed in light of economic considerations. *See* Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) ("Directive 85/374").

Significantly, the European rule, like the American common law tort rule for products liability, makes few bright-line distinctions between risks and benefits based on cost or based on health and safety.

It goes without saying, perhaps, that framing an appropriate liability rule is only one element of creating a products liability policy. In Europe, although Directive 85/374 establishes strict product liability principles that parallel ours in some respects, the consequences of those principles have been mitigated by other factors unique to the European Union. National healthcare systems, for example, tend to reduce damages. In addition, European tort plaintiffs generally cannot hire attorneys on contingent-fee arrangements, typically bear the defendant's costs when they lose, and almost never have the benefit of broad American-style discovery procedures, civil juries, or punitive damages. Sandra N. Hurd & Frances E. Zollers, *Product Liability in the European Community: Implications for United States Business*, 31 AM. BUS. L.J. 245, 254-55 (1993); *see also* Andrew C. Spacone, *Strict Liability in the European Union—Not A United States Analog*, 5 ROGER WILLIAMS U. L. REV. 341, 343-44 (2000) (noting that the European Union was concerned "that the adoption of strict liability in the European Union would have led to the 'excesses' (*e.g.*, high judgments) of products law in the United States" and ultimately reached a "compromise between the interests of consumers and business").

In the United States, in contrast, a critical component of balancing strict product liability with commercial concerns has been federal pre-emption of State common law tort suits. Even given robust pre-

emption, a given company's litigation expenses are often orders of magnitude higher in the United States than in Europe. *See* Stephen B. Presser, *How Should the Law of Products Liability Be Harmonized? What Americans Can Learn From Europeans*, 2 GLOBAL LIAB. ISSUES, 13 n.8, 13 (Feb. 2002), *available at* http://www.manhattan-institute.org/pdf/gli_2.pdf ("Dow now spends 100 times as much [on litigation] (as a percentage of sales) in the U.S. as it does in Europe[.]"). Significant retrenchment on pre-emption would make the United States an international anomaly—a country with the strict products liability other countries employ for the sake of consumer protection, but lacking any of the limits the European Union places on strict liability for the sake of economic efficiency.

II. TRADITIONAL CONFLICT PRE-EMPTION IS ROOTED IN THE CONSTITUTION'S STRUCTURE AND SUPREMACY CLAUSE AND IS CAPABLE OF PRINCIPLED APPLICATION.

Traditional conflict pre-emption, just as much as express statutory pre-emption, is both rooted in the Constitution and readily applied to a broad swath of litigated cases, including this one.

A. The Founders Expected Expansive Conflict Pre-emption, Viewing It As An Essential Element Of The Constitution's Structure.

Geier recognized the straightforward constitutional rule that State laws that conflict with federal law are "nullified by the Supremacy Clause."

Geier, 529 U.S. at 873. This rule applies equally to *all* conflicts, *id.*, including those rooted solely in the plain terms of federal law, as well as those rooted in an express pre-emption provision. Moreover, conflict pre-emption applies equally regardless of whether the State law impossibly conflicts with federal law or merely poses some other obstacle to its operation. *Id.* at 873-74. Accordingly, even where Congress has not expressly pre-empted State law, and even where (as in *Geier*) the conflict flows from the structure of the relevant federal provision, the Supremacy Clause retains full force and effect.

Geier's conflict pre-emption analysis, while principally explained from the perspective of logic and reason, comports well with the jurisprudence, decisions, and understandings of leading Founders. The *fons et origo* of the Court's federal pre-emption jurisprudence is this Court's *conflict* pre-emption decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Like *Geier* and this case, *Gibbons* involved a federally issued license. There, the relevant license authorized its holder to operate "vessels ... in the coasting trade." *Id.* at 2. In *Gibbons*, as in *Geier* and as here, those opposing federal pre-emption contended that the relevant federal authorization should be deemed good for purposes of federal law alone and that nothing in the plain terms of the authorization precluded States from piling on additional requirements. Indeed, the federal statute at issue in *Gibbons* was far less clear in granting Mr. Gibbons the option of potentially trading in New York waters (notwithstanding a conflicting New York statute) than the relevant Safety Act regulations are in granting car manufacturers an express option of selecting lap-belt-only restraints for

certain model years and seating positions. Nonetheless, the *Gibbons* Court, speaking through Chief Justice Marshall, found federal conflict pre-emption under the Supremacy Clause. In the process, the Court's opinion denounced in the strongest possible terms the essential argument that now recurs almost two centuries later—the proposition that "the original powers of the States" should be retained "if any possible construction will retain them[.]" *Id.* at 222.

The conclusion reached in *Gibbons* and *Geier* follows naturally from the original understanding of the Supremacy Clause. On this view, once a conflict between State and federal law is discerned, a Court's constitutional duty to nullify the conflicting State law becomes clear. Alexander Hamilton, writing in THE FEDERALIST, maintained that federal supremacy is "only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government[.]" THE FEDERALIST No. 33, at 202 (Hamilton) (Clinton Rossiter ed., 1961). Hamilton concluded that even apart from the Supremacy Clause any federal law constitutionally enacted "would be supreme in its nature, and could not legally be *opposed or controlled*." *Id.* at 205 (emphasis added). Moreover, while he disagreed with Hamilton over other key features of the Constitution's federalist architecture, Madison agreed with Hamilton on the pre-emption question. Like Hamilton, Madison recognized the need for broad and effective—not crabbed and ineffective—federal supremacy. *Id.* THE FEDERALIST, No. 44, at 287 (Madison) ("[A Constitution without supremacy] would have seen the authority of the whole society

every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.").

The response often given to contentions favoring broad federal conflict pre-emption of the sort favored by Chief Justice Marshall in *Gibbons* and endorsed by Hamilton and Madison in THE FEDERALIST is an exhortation for Congress to obviate the need for conflict pre-emption altogether by paying careful attention to crafting more express pre-emption provisions. 2010 ABA House of Delegates Resolution 117, *available at* http://www.abanow.org/2010/07/am-2010-117/. But over its first two and a quarter centuries, Congress never has spoken distinctly and in adequate detail as to when federal law should and should not displace State law, and it can confidently be predicted that it never will.

Congress does not speak clearly on pre-emption questions because it cannot. Congress is badly outnumbered by States, now by a ratio of fifty to one. It finds itself hobbled from quickly responding to shifting State encroachments on federal-policy territory by the practical brakes on lawmaking entailed by the Constitution's bi-cameralism and presentment requirements that so frustrated President Wilson and inflamed his admiration for the British Parliament. And it finds its federal policies attacked from multiple directions, as whatever policy equilibrium prevails at the federal level naturally comes under challenge from diverse and conflicting private interests, each of which appeals to that particular State or local jurisdiction most sympathetic to its own perceived plight. *Compare, e.g., San Diego Bldg. Trades Council v.*

Garmon, 359 U.S. 236 (1959) (finding implied conflict pre-emption of State law that would have shifted labor law in the favor of management), and *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 150-51 (1976) (same); *with Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2414-18 (2008) (finding implied conflict pre-emption of State law that would have shifted labor law in the favor of labor). The result is a sitting-duck set of federal policies, targets painted brightly on their backs, that practically invites State infringements in various disguised forms and from multiple directions—without any hope of an effective congressional response.

Against this painful backdrop, and given the striking consensus among the Founders, it is surprising that originalist scholarship has sometimes fundamentally misconceived the foundations of Supremacy Clause analysis. *See, e.g.*, *Geier*, 529 U.S. at 908 & n.22 (Stevens, J., dissenting) (citing Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231-32 (2000)). The *Geier* dissent, for example, spotlighted one such originalist analysis of the Supremacy Clause's language and origins. *See id.*

But what both the *Geier* dissent and the originalist scholarship it cited fail to appreciate is the structural context in which the Supremacy Clause operates. *See, e.g.*, *Nelson*, *supra*, at 260. For instance, somewhat analogous to the operation of the Supremacy Clause, a later legislature has power to nullify the acts of its predecessor legislature, just as the Congress has power to nullify and displace acts of State legislatures. Critically, however, in this example the legislature enacting the later law has

the benefit of actually knowing, or at least being capable of actually knowing, the precise contours of the earlier law. Contrast that situation with federal conflict pre-emption. In the conflict pre-emption context, as we have seen, Congress cannot possibly know in advance, or respond after the fact to, all of the *future* State infringements that federal laws inevitably elicit from multiple directions, fifty States, and divergent interests. Under these circumstances, the need to interpret conflict pre-emption to operate more expansively than the somewhat analogous rules governing displacements of earlier laws by later ones is apparent.

Accordingly, even putting aside the keen interest the Court has shown across many decades in the views of Hamilton, Madison, and Marshall, it is surprising that their pre-emption views have yet to sweep the field, given the recent upsurge in originalist scholarship. The probability that this notable trio are all wrong in their conviction that federal conflict pre-emption must be broad and robust—not narrow and enfeebled—must give pause to those scholars who favor narrow conflict pre-emption on originalist grounds. The Supremacy Clause states expressly that where federal law conflicts with State regulation, it is State law that must give way. But even without such express constitutional recognition, the need in the Constitution's very structure for the self-same principle was apparent—or at least that is what Hamilton and Madison believed, and what this Court's landmark decision in *Gibbons* strongly implies. It is unlikely that all three could be wrong.

B. Conflict Pre-emption As Understood By The Founders Can Be Applied To This Case In Principled Fashion.

The Founders' view that federal conflict pre-emption is primary and necessary and should be expansive remains to be applied to these facts. Notably, separate opinions from members of the Court have openly wondered whether federal conflict pre-emption of the breadth envisioned at the Founding was ever capable of principled application, or perhaps, whether it remains so today. *See, e.g.*, *Wyeth*, 129 S. Ct. 1187, 1204-07 (Thomas, J., concurring in the judgment).

But whatever difficulties might arise elsewhere, there is no difficulty finding conflict pre-emption here; no need to resort to debatable evidence; no need for concern over unbounded notions of pre-emption. Confirmatory support for a finding of conflict pre-emption appears, to be sure, in the NHTSA administrative record. But that confirmatory evidence is just that—additional evidence, not essential support. Rather, the underlying and pre-emptive collision between the NHTSA's seatbelt regulations and Petitioners' allegations of California tort liability is apparent solely on the face of the relevant delegation of regulatory authority; NHTSA's implementation of that delegation; and the essential elements of Petitioners' design defect product liability claims.

To understand the relevant conflict, consider the plain terms of the operative legal documents. *First*, Congress delegated to the Secretary of Transportation authority to establish a "coordinated national safety program," PUB. L. NO. 89-533, by

promulgating federal motor vehicle safety standards by taking into account "motor vehicle safety" as well as practicability factors such as the availability of technology and economic costs. *See* 49 U.S.C. § 30111(a). *Second*, NHTSA chose to implement that delegation by offering manufacturers two design options for seatbelts in the relevant seating positions for model years at issue in this case. *See* 49 C.F.R. § 571.208 (1987). *Third*, Petitioners describe their "theory of liability" as holding that "when the Williamson minivan was manufactured in 1993," there were "technologically feasible and cost-effective methods" of installing lap/shoulder belts in the rear outboard seating position in which Mrs. Williamson sat during the crash and that, if employed, those alternatives would have improved safety and reduced "a known risk of serious injury or death." *See* Pet. Br. 18. Petitioners thus chose to plead California common law violations that, if left unpre-empted, would require a jury to re-examine safety, technological feasibility and cost-effectiveness—the same three factors NHTSA balances under its delegated rulemaking authority.

The key point is that Congress is presumed to legislate against the backdrop of an informed understanding of preexisting law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). The Congress that enacted the Safety Act is thus presumed to have known that instead of an administrative delegation it might alternatively have delegated authority to the federal courts to define *federal* common law liability rules, as it has done elsewhere. *See, e.g., Leegin Creative*

Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute."). Of course, Congress is permitted to delegate rulemaking and adjudicating authority to agencies in lieu of granting common law powers to courts. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). But that very choice entails a range of consequences that Congress must be presumed to have understood and intended.

In this case, NHTSA was created by Congress for the express purpose of making technical cost-benefit tradeoffs involving vehicle safety; it received its rulemaking authority from an express delegation of Congress; and it was staffed by experts with the advanced technical training needed to carry out the agency's mission. The agency then exercised its delegated authority to promulgate seatbelt regulations only after allowing participation by interested persons. *See generally* 5 U.S.C. § 551 *et seq.* And because its regulation fell within its delegated authority and was validly promulgated, this Court's precedents give NHTSA's regulation the "force and effect of law." *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

Furthermore, precisely because of their institutional competence and informational advantages, agencies such as NHTSA—unlike common law litigants—are entitled to deference for reasonable interpretations of statutory mandates. *See generally Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Deference thus attaches where agencies reach their decision through a public process such as notice-and-comment

rulemaking, *compare Christensen v. Harris County*, 529 U.S. 576, 587 (2000), and where the nature of the agency decision merits deference, *compare Barnhart v. Walton*, 535 U.S. 212, 222 (2002). Likewise, legislation and regulations, unlike common law liability rules, are presumed to operate prospectively, not retrospectively. *See Martin v. Hadix*, 527 U.S. 343, 357 (1999); *Eastern Enters. v. Apfel*, 524 U.S. 498, 533 (1998). Here, for example, NHTSA's governing seatbelt regulations were finalized on November 2, 1989 but first applied to vehicles manufactured almost two years later, on or after September 1, 1991. *See* 54 Fed. Reg. 46,257 (Nov. 2, 1989).

Decisionmaking by State juries is far different and Congress must be presumed to know those differences. State juries decide cases based on narrow facts and the competing expert interpretations the parties choose to put forward. Juries deliberate in a black box, with no obligation to give reasons for their decisions. *See* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 20 (2001). Jury decisions imposing common law liability apply retroactively and are biased toward hindsight, for juries necessarily scrutinize and impose liability for past conduct. *See, e.g., Riegel*, 552 U.S at 323 ("A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by [a federal agency.] A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court."). In this

fashion, State tort verdicts force nationwide manufacturers to comply retroactively with State tort standards that can be predicted with more or less accuracy, but do not exist yet.

Given the stark differences—going far beyond stringency—between agency regulation and common law liability, it would be startlingly incongruous for the Safety Act to leave conflicting tort law unpre-empted. Congress's Safety Act delegation to NHTSA requires NHTSA to issue reasoned interpretations of Congress's delegated authority, promulgate prospective regulations, and base its regulations on the factors of safety, cost, and technological availability. It thus is difficult to explain why, for public interest reasons, Congress might choose, first, to delegate federal authority to set prospective requirements based on safety, technological feasibility, and cost to a group of experts on the national level; and, simultaneously, choose to leave States free to establish different, retroactively applied, requirements based on the same considerations of safety, technological feasibility, and cost at the local level.

Tellingly, *federal* common law, as this Court has held, is readily supplanted by *federal* legislation. *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 95 n.34 (1981) ("[O]nce Congress addresses a subject ... the task of the federal courts is to interpret and apply statutory law, not to create common law."). Given the Supremacy Clause, it would be anomalous if *State* common law were more resistant than federal common law to displacement by the federal government's own positive-law enactments.

In short, the conflict here is fundamental. It is not merely one of stringency and geographic scope, but also one of expertise, decisionmaking process, and prospectivity. It could hardly be more stark regardless of how one defines incompatibility for Supremacy Clause purposes. *Cf. Wyeth*, 129 S. Ct. 1187, 1207 (Thomas, J., concurring in the judgment). Congress must be presumed to have understood that, instead of administrative regulations, it might alternatively have chosen an authorization for federal courts to make federal common law. It presumably rejected that option because it wanted safety, feasibility, and cost to be balanced in reasoned fashion, prospectively, and by experts. Precisely because the Safety Act should not be interpreted "to defeat its own objectives" and thus "destroy itself," *Geier*, 529 U.S. at 872; *Adams Express*, 226 U.S. at 507, the Court should respect those choices and hold pre-empted California's conflicting liability rules.

CONCLUSION

The Court should affirm the judgment of the Court of Appeal of California.

Respectfully submitted,

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DELBERT WILLIAMSON, ET AL.,
PETITIONERS,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

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BRIEF FOR THE STATES OF ILLINOIS, ARIZONA, ARKANSAS, CALIFORNIA, HAWAII, IOWA, KANSAS, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OKLAHOMA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions?

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INTEREST OF THE *AMICI CURIAE*

State common law has long held automakers accountable for injuries caused by defective vehicles. These laws not only encourage manufacturers to innovate and build safer cars, but they also ensure that injured persons receive compensation for medical expenses, lost wages, and other costs associated with their injuries. The decision below threatens to preempt a significant share of these laws, thereby reducing these incentives and shifting the costs of caring for seriously injured accident victims from automakers to state-run, taxpayer-funded programs. Because the decision undermines States' longstanding police power to protect health and safety, the Amici States have a significant interest in the outcome of this case.

But the States' interest is substantial for another, more fundamental reason. The court below rested its holding on implied "obstacle" preemption, a doctrine that several members of the Court have criticized and that results in preemption without any clear statement by Congress that it intends to displace state law. This doctrine—supplanting state law without any express congressional intent to do so—not only intrudes on state sovereignty, but it increases the risk of unpredictable decisions by courts that must evaluate preemption claims without guidance from the statutory text. The States have a profound interest in the Court's continued adherence to its long-held presumption against preempting state law and, correspondingly, to a narrowly limited application of "obstacle" preemption.

STATEMENT

Congress expressed a single purpose in passing the National Motor Vehicle Safety Act ("Act")—"to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. To this end, the Act authorizes the formulation of federal "minimum" vehicle safety standards, *id.* § 30102(a)(9), while counting on state tort law to experiment with more rigorous standards, to further deter unsafe manufacturing, and to compensate victims, *id.* § 30103(e) ("[c]ompliance with a motor vehicle standard prescribed under this chapter does not exempt a person from liability at common law"). This case asks the Court to decide whether, notwithstanding the Act's clear division of labor between state and federal law, a decision not to require lap/shoulder belts as an element of the federal "minimum" requirements also prohibits state tort law from requiring them.

1. The Act directs the Secretary of Transportation ("Secretary") to prescribe federal "motor vehicle safety standards," *id.* § 30111, and the Secretary has delegated this responsibility to the National Highway Traffic Safety Administration ("NHTSA"), an operating administration within the Department of Transportation ("DOT"), 49 C.F.R. § 1.50(a). "'[M]otor vehicle safety standard' means a *minimum* standard for motor vehicle or motor vehicle equipment performance," 49 U.S.C. § 30102(a)(9) (emphasis added), which is "practicable, meet[s] the need for motor vehicle safety, and [is] stated in objective terms," *id.* § 30111. And while the Act preempts state standards that differ from federal rules "applicable to the same aspect of performance," *id.* § 30103(b)(1), the

Act's saving clause provides that "[c]ompliance with a motor vehicle standard prescribed under this chapter does not exempt a person from liability at common law," *id.* § 30103(e).

2. One such standard is Federal Motor Vehicle Safety Standard 208 ("Standard 208"), which "specifies performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. § 571.208 (S1). In 1989, NHTSA amended Standard 208 to require manufacturers to install lap/shoulder belts for rear "outboard" seats in most passenger vehicles. (An outboard seat is one located less than 12 inches from a vehicle's side wall. 49 C.F.R. § 571.3. Center seats are "inboard" seats.) NHTSA had determined that requiring lap/shoulder seatbelts for rear seats would improve passenger safety, because these belts are more effective in reducing deaths and moderate-to-severe injuries than lap-only belts. 53 Fed. Reg. 47,982, 47,982 (Nov. 29, 1988); 54 Fed. Reg. 25,275, 25,276 (June 14, 1989); 54 Fed. Reg. 46,257, 46,257-46,258 (Nov. 2, 1989). In fact, NHTSA concluded that the safety benefits from installing lap/shoulder seatbelts in the rear seats of minivans were actually "greater-than-average," as these vehicles were becoming increasingly popular and have high rear-seat occupancy rates. 53 Fed. Reg. at 47,985-47,986.

Ultimately, however, NHTSA declined to require lap/shoulder seatbelts for rear *inboard* passengers, not because the belts were any less effective in protecting the safety of these riders, but out of technical concerns and fears about the costs associated with installing belts in rear inboard seats. 53 Fed. Reg. at 47,984-47,985; 54 Fed. Reg. at 46,258. Thus, for example, NHTSA acknowledged that its rule excluded from the

lap/shoulder seatbelt requirement the seat next to the aisle on the right-hand side of many minivans, because these seats (when more than 12 inches from the vehicle's side) are technically "inboard," 53 Fed. Reg. at 47,985; 54 Fed. Reg. at 46,258, and credited one automaker's concern that installation of lap/shoulder belts for these seats might obstruct the aisle and "cause entry and exit problems for occupants of seating positions to the rear," unless "structural modifications" were undertaken at "disproportionately high cost[]," 54 Fed. Reg. at 46,258. As of 1989, therefore, NHTSA merely "encourage[d]" manufacturers to install lap/shoulder belts for these seats. *Ibid.* It was only after a congressional directive in 2002, see Anton's Law § 5, 49 U.S.C. § 30127 note, that NHTSA revised Standard 208 to require that automakers install lap/shoulder seatbelts for all rear inboard seats in many vehicles (including minvans), 49 C.F.R. § 571.208 (S4.1.5.5, S4.2.7.1).

3. Thus, when respondents manufactured petitioners' 1993 Mazda MPV Minivan, NHTSA had yet to require a lap/shoulder belt for the second row aisle seat, where Thanh Williamson was sitting when another vehicle struck her van. Pet. App. 3-4, 11. Without a lap/shoulder belt, Thanh's body jack-knifed over her lap belt, killing her; her husband and daughter were sitting in seats equipped with lap/shoulder seatbelts, and they survived. *Id.* at 3, 6. Petitioners brought suit claiming that the minivan was defective as a matter of California law because Thanh's seat had no lap/shoulder belt. *Id.* at 3-4, 23.

4. The California Court of Appeal held that Standard 208 preempted petitioners' claim. The court acknowledged that the federal rule did not expressly

preempt California law. *Id.* at 7. Nor did the court believe that Congress intended to "occupy" the "field" of automobile safety or that it is "impossible" for automakers to comply with both federal safety standards and California tort law. *Ibid.* (internal quotations and citation omitted). Rather, the court held that the continued availability of state tort remedies would raise an "obstacle" to Congress' "purposes and objectives." *Id.* at 7, 23 (internal quotations and citation omitted). The court feared that, "[i]f successful," the state-law "claim would bar motor vehicle manufacturers from employing one of the passenger restraint options authorized by [Standard 208] because it would effectively require them to install only lap/shoulder seatbelts at inboard seating positions to avoid liability under California law." *Id.* at 23. Purporting to apply *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), the court held that state-law liability under these circumstances "would stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in [Standard 208]." Pet. App. 23 (internal quotations and citation omitted).

5. This Court granted certiorari on May 24, 2010.

SUMMARY OF ARGUMENT

Promoting vehicle safety was Congress' one expressed purpose in passing the Act, and to that end it preserves a significant role for state common law where, as here, that law demands more of manufacturers than the federal "minimum" requires. Experience confirms what Congress appears to have presumed—that state law is instrumental in improving vehicle safety. Alone, NHTSA is unable to keep pace with developments in safety technology, and state lawsuits have played a critical role in eliciting data needed to inform federal regulatory decisions. Where federal standards are inadequate or obsolete, moreover, the threat of liability under state law encourages automakers to innovate and build safer cars. And without any private right of action under the Act, state tort suits are the only means of legal redress for those injured by unsafe vehicles. By preempting a significant share of this state law, the decision below deprives the regulatory scheme of much of its intended benefit.

But the ruling below, if affirmed, would have negative implications well beyond the universe of vehicle safety regulation. The "obstacle" preemption doctrine on which the court below relied not only disregards a statute's plain language, but it also violates the general requirement that Congress make any intent to displace state law express. This latter, "clear statement" rule gives interested parties notice when Congress intends to preempt state law, permitting informed participation in the legislative process, including by the States. Requiring a clear statement also discourages "free-form judicial policymaking"—as members of this Court have described obstacle

preemption—and yields more predictable outcomes, rather than leaving manufacturers, consumers, and courts to guess at whether untested federal laws have displaced state law causes of action. Accordingly, obstacle preemption must be applied only rarely, when it is obvious that state law undermines Congress' express purpose in enacting legislation.

The decision below stretches obstacle preemption well past its breaking point, on the theory that this Court's decision in *Geier* requires that result. But *Geier* turned on a critical fact not present here—NHTSA had determined that giving each manufacturer a choice of safety devices would itself promote vehicle safety in the long term. *Geier* thus involved a decision by federal authorities to improve safety by protecting manufacturer choice, whereas this case involves a routine decision not to mandate a particular practice as part of the "minimum" federal safety standard. The former is an affirmative federal requirement—manufacturers shall have the right to choose—that regulators deemed necessary to promote the Act's stated aim (safety), and it preempts contrary state law that interferes with that aim; the latter is simply the failure to require something federally, subject to Congress' admonition that "[c]ompliance with a motor vehicle standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

Nor, finally, is there anything to the claim that federal preemption is necessary to avoid a patchwork of wildly divergent legal standards nationwide. The Act does not make nationwide uniformity a priority, as this Court has recognized, and, in any event, design-defect

laws vary little from State to State and are appropriately deferential to federal standards.

ARGUMENT

The decision below fails along two dimensions. First, preempting petitioner's California suit is impossible to square with the Act's plain language and with Congress' decision to preserve an important role for state law in improving vehicle safety and compensating victims. Second, preempting California law here would do violence to the presumption against federal preemption and its corollary, the requirement that Congress speak clearly when it seeks to displace state law, by stretching "obstacle" preemption well beyond its application in *Geier*. Finally, respondents' anticipated claim that preemption is required to protect automakers from inconsistent state laws is a red herring. State laws vary little on this score, and the Act contemplates some disuniformity in any event.

I. THE ACT DEPENDS CRITICALLY ON STATES' TRADITIONAL POLICE POWERS TO IMPROVE VEHICLE SAFETY AND COMPENSATE VICTIMS.

The Act identifies one aim: vehicle safety. And it sets out to achieve that aim by two, complementary means—the formulation of minimum federal safety standards, and the operation of traditional, state tort law to test more aggressive standards, provide additional deterrence, and offer otherwise-unavailable compensation to accident victims. The decision below upends this scheme and forfeits the significant advantages in Congress' two-tiered approach to safety regulation.

A. The Act Preserves An Essential Role For State Common Law, And The Decision Below Eviscerates That Role.

The Act's plain language assumes that state tort law may impose higher burdens on vehicle manufacturers than the baseline, federal standards will. Federal regulations establish "minimum" vehicle safety standards, 49 U.S.C. § 30102(a)(9), and States may not adopt inconsistent regulations, *id.* § 30103(b), but the Act's saving clause warns that merely satisfying the federal "minimum" "does not exempt a person from liability at common law," *id.* § 30103(b)(1). "'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). And the "'plain wording'" of a statute provides the "'best evidence'" of Congress' intent. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Here, the Act's "plain wording" eliminates any doubt over Congress' intent: States may not adopt regulations that differ from their federal counterparts on the same subject, but compliance with federal standards does not relieve an automaker from damages liability under state tort law.

The court below ignored this intent when it held that regulatory compliance relieves automakers of common-law liability for failing to take a precaution where, as here, there is evidence that NHTSA declined to require that precaution as part of the federal "minimum." But that holding renders the Act's saving clause largely meaningless. It cannot be that the clause applies only where federal regulators fail even to consider a more stringent standard, as the decision

below would have it. Such a rule would preserve a role for state common law only in areas where NHTSA chose the federal "minimum" from an abridged menu of options, one that omitted the practice that state law requires in a later case. And it would open the door wide to abuse, encouraging automakers to bury NHTSA in endless lists of regulatory options, only to claim later that any option not adopted by the agency is off limits as grounds for liability under state law. Such a rule preserves little state law from federal preemption.

The California appellate court's error becomes even more obvious when one considers the generally applicable presumption against preemption, and the corresponding requirement that Congress speak clearly when it supplants state law, additional elements of a proper preemption analysis addressed in Part II, *infra*. If left standing, the decision below would substantially undermine Congress' plan to supplement federal safety regulation with liability under state common law. And as the next section shows, this would have significant practical consequences.

B. State Tort Law Plays An Invaluable Part In Improving Vehicle Safety And Compensating Victims.

Experience has shown the wisdom of Congress' decision to preserve a substantial role for state tort law under the Act. Federal regulators have lacked resources needed to police vehicle safety effectively without help from private litigants, whose common-law suits have proved essential in encouraging manufacturers to innovate in the area of passenger safety and in eliciting information needed for future standard-setting. Moreover, there is no private right of action for damages

under the Act, leaving state tort suits as the only means for those injured by unsafe vehicles to recover from manufacturers. Accordingly, it is essential to the Act's express purpose that individuals remain free to pursue state tort claims against automakers even where, as here, manufacturers' common-law duties are more expansive than the federal "minimum."

1. As an initial matter, "[f]ederal labeling and design requirements are sometimes the product of political compromises, excessive influence within the agency by the regulated industry, or excessive dependence upon industry sources for necessary information." Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 Md. L. Rev. 1210, 1238 (1996) (footnotes omitted); see also *id.* at 1238 nn.167-169 (collecting citations). "Tort liability offsets these flaws in the regulatory process by encouraging manufacturers to exceed federal safety requirements when it is cost-effective to do so." *Id.* at 1238. Thus, rather than conflicting with federal safety aims, state tort law "offers an additional, and important, layer of consumer protection that complements [federal] regulation." *Wyeth*, 129 S. Ct. at 1202; accord *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 451 (2005) ("[p]rivate remedies * * * aid, rather than hinder, the functioning of" federal law).

Indeed, NHTSA's lack of resources and other limitations are well-documented. Each year, the agency receives more than 30,000 complaints, but its staff (which numbers less than 650) opens only approximately 100 investigations. See U.S. Dept. of Transp. Fiscal Year 2009 Budget In Brief, at 76, available at http://www.dot.gov/bib2009/pdf/bib2009.pdf; Jo Craven McGinty, *How Safety Agency Investigates*

Complaints, N.Y. Times, Mar. 1, 2010. And NHTSA makes only limited use of its statutory authority to issue fines and subpoenas; lacks technical expertise in certain areas; suffers from frequent turnover in leadership; and, according to a former director, "'doesn't always have the staff or money'" to police vehicle safety effectively. Eric Lichtblau & Bill Vlasic, *Safety Agency Scrutinized as Toyota Recall Grows*, N.Y. Times, Feb. 10, 2010. As a result, congressional officials and experts have concluded that NHTSA is either overly dependent on automakers for information regarding vehicle safety or, worse, captive to the industry it is charged with regulating. See *ibid.*; cf. *Wyeth*, 129 S. Ct. at 1202 (recognizing, in course of rejecting preemption claim, that "[t]he FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the post-marketing phase as new drugs emerge").

The well-publicized problems at Toyota present a recent illustration. Since late 2009, the automaker has recalled more than 8 million vehicles to address safety problems. See Lichtblau & Vlasic, *supra*. But NHTSA had been receiving complaints about sudden, unintended acceleration in Toyota automobiles since 2000, without taking any meaningful, responsive action. See *ibid.*; Micheline Maynard, *U.S. Considers Brake Override System*, N.Y. Times, Mar. 2, 2010. Only now that unintended acceleration is believed to have caused 89 deaths is NHTSA taking steps, see Maynard, *supra*; Associated Press, *Sudden Acceleration Death Toll Linked to Toyota Rises*, N.Y. Times, May 25, 2010, a delayed response that has become the subject of a

congressional investigation, see Lichtblau & Vlasic, *supra*.

2. But even if NHTSA could enforce federal standards effectively, evolving technology quickly renders the standards themselves obsolete. Knowledge and technology are constantly advancing, yet safety standards, once issued, may remain in place for years. And without the specter of state tort liability, automakers have little incentive to incorporate new safety technology, much less to invest in innovation; it is easier and cheaper merely to comply with the outmoded federal standard. See generally Stephen G. Breyer, Regulation and Its Reform 105 (Harvard Univ. Press 1982) ("a design standard tends to freeze existing technology" and "diminish[] incentive[s] to look for better methods").[1]

For example, it took the repeated failure of Firestone tires installed on Ford Explorer vehicles (and the ensuing likelihood of rollover) plus prodding by Congress for NHTSA to revise a 1971 roof crush resistence standard for the first time *in 2008*. See generally Allison M. Zieve, *Thoughts on the Rise and Decline of the Implied Preemption Theory for State Law Damages Claims*, 65 N.Y.U. Ann. Surv. Am. L. 661, 674-675 & n.62 (2010); David C. Vladeck, *The Emerging Threat of Regulatory Preemption* 9 (Amer. Const. Soc'y

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[1] Congress recognized and sought to address this problem. The Act requires the Secretary to "establish and periodically review and update on a continuing basis a 5-year plan for testing motor vehicle safety standards prescribed under this chapter that the Secretary considers capable of being tested." 49 U.S.C. § 30111(e). As we explain, however, NHTSA has not been able to satisfy this requirement.

for Law & Policy 2008), available at http://www.acslaw.org/files/Vladeck%20Issue%20Brief.pdf. Technology had changed substantially during those 37 years, and by the time NHTSA proposed the new standard, a number of automakers were already producing cars that met or exceeded it. See Zieve, *supra*, at 675 & n.66. Congress also ordered NHTSA to require manufacturers to install tire pressure monitoring systems—which improve fuel economy, extend tire life, and prevent crashes—in all new vehicles. See *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 43-44 (2d Cir. 2003). Although NHTSA had rejected such a requirement nearly two decades earlier (citing cost and feasability concerns), technology had "substantially improved" in the interim, making these systems more readily available, and at lower cost. *Ibid.* Nor is it difficult to find other examples of NHTSA's failure to keep pace with advances in safety technology. See, *e.g.*, Vladeck, *supra*, at 9 ("NHTSA's fuel safety standard is at least thirty-five years out of date, even though fuel-fed fires are a leading cause of fatalities in vehicle crashes.").

3. And while state tort suits encourage innovation and hold manufacturers to an evolving standard that accounts for changing technology, this is not all that these suits do. Private tort litigation serves as a "catalyst" for improved safety by eliciting information used in future standard-setting. *Bates*, 544 U.S. at 451. Material produced during litigation helps regulators and the public identify problems associated with particular products. See *Wyeth*, 129 S. Ct. at 1202 (tort suits "may motivate injured persons to come forward with information" and "uncover unknown * * * hazards"); *Bates*, 544 U.S. at 451 (tort suits "may aid in the

exposure of new dangers") (internal quotations omitted). At the same time, the prospect of damages liability may encourage manufacturers to disclose known safety risks. See *Wyeth*, 129 S. Ct. at 1200, 1202 (tort suits "provide incentives for * * * manufacturers to disclose safety risks promptly" and "motivat[e] manufacturers to produce safe and effective" products); *Bates*, 544 U.S. at 451 (tort suits "provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement") (internal quotations omitted).

Recent suits against Toyota are producing information useful in isolating the cause of the acceleration problem. See Bill Vlasic, *Lawsuit over Crash Adds to Toyota's Difficulties*, N.Y. Times, Feb. 5, 2010. Likewise, tort suits elicited important information about the Ford/Firestone problem. See Zieve, *supra*, at 674 & n.62. And it was state tort litigation that prompted the disclosure of safety information about Vioxx (a pain management drug later shown to carry cardiovascular risks) that eventually led to its withdrawal from the market. See Elizabeth J. Cabraser, *When Worlds Collide: The Supreme Court Confronts Federal Agencies with Federalism in* Wyeth v. Levine, 84 Tul. L. Rev. 1275, 1292 & nn. 71-72 (2010).

4. Finally, state tort suits represent the only means by which injured parties can recover from at-fault manufacturers. Unlike many federal laws, the Act offers no private right of action for damages, and this fact alone counsels heavily against preempting state law. Indeed, when Congress has in rare cases expressly preempted tort law, "it has generally provided a federal

remedy in lieu of the displaced state remedy." Vladeck, *supra*, at 2 & n.4; see also *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144-145 (1990) (ERISA provision giving plan participants civil action to address violations favors preemption).

Conversely, the Court should be reluctant to preempt state law where federal law provides no remedy, for Congress was unlikely to intend that result. See *Bates*, 544 U.S. at 449 ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."); *Lohr*, 518 U.S. at 487 (plurality op.) (view that "Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device" is "unpersuasive" and "implausible"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (recognizing "Congress' failure to provide any federal remedy" for injured persons, and stating that it was "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). This reluctance acknowledges that state tort suits have a "compensatory function" that is "distinct" from the role of federal statutes and regulations. *Wyeth*, 129 S. Ct. at 1202; accord *Sprietsma*, 537 U.S. at 64 ("It would have been perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating victims.").

This distinct and separate function is a critical component of the States' traditional ability to protect the health and safety of their residents. States have a "compelling interest" in "ensuring that victims * * * are

compensated by those who harm them." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991); see also *infra* pp. 20-21 (describing state law's traditional operation in field of automobile defect claims). Preempting state tort law, without providing a federal remedy, significantly interferes with that interest. See *Lohr*, 518 U.S. at 488 (plurality op.) (preemption of tort claims would require "great[] interference with state legal remedies, producing a serious intrusion into state sovereignty"). And that interference is no less here, where the court below held that federal law preempts state common law because the latter was more rigorous than the federal "minimum."

II. The Decision Below Offends State Sovereignty, And Its Legal Rule Is Unworkable In Practice.

Part I showed that the decision below is impossible to square with the Act's plain language and would strip Congress' intended, state/federal scheme of many of its benefits. But the decision also founders on another, more fundamental ground. The doctrine of obstacle preemption, which the court below applied, displaces state law without any express congressional intent to do so, a violation of the "clear statement" rule that offends state sovereignty and leaves courts to decide preemption claims without any guidance from the statutory text. See *Wyeth*, 129 S. Ct. at 1207-1208, 1214-1217 (Thomas, *J.*, concurring in the judgment) (suggesting that Court abandon doctrine altogether); *Bates*, 544 U.S. at 459 (Thomas, *J.*, concurring in judgment in part and dissenting in part); *Geier*, 529 U.S. at 906-08 (Stevens, *J.*, dissenting); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, *J.*, concurring in part

and concurring in the judgment). These concerns counsel powerfully against a broad use of obstacle preemption, and the court below erred in concluding that *Geier* compels its application here.

A. Preemption Without A Clear Directive From Congress Offends State Sovereignty.

Any "pre-emption analysis must be guided by respect for the separate spheres of governmental authority preserved in our federalist system," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987) (internal quotations omitted), and these concerns are heightened here, where the federal law implicates an area of historic state regulation. Recognizing the gravity of any decision to preempt the law of another sovereign, federal preemption doctrine includes as its "cornerstone[]" a strong presumption against preemption. *Wyeth*, 129 S. Ct. at 1194. The presumption rests on "respect for the States as 'independent sovereigns in our federal system,'" which requires an "assum[ption] that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Id.* at 1195 n.3 (quoting *Lohr*, 518 U.S. at 485). Courts must proceed on the view "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 1194-1195 (quoting *Lohr*, 518 U.S. at 485). The corollary to this presumption is the "clear statement" rule: if Congress "intends to alter the usual constitutional balance between the States and the federal government," it must "make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotations and brackets omitted).

1. The importance of the "clear statement" rule cannot be overstated. The requirement that Congress give notice of its intent to preempt state law guarantees the continued "effectiveness of the federal political process in preserving the States' interests." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). It "place[s] * * * the power of pre-emption squarely in the hands of Congress, which is" best "suited * * * to strike the appropriate state/federal balance." *Geier*, 529 U.S. at 907 (Stevens, *J.*, dissenting). James Madison thus predicted that Congress, because it is comprised of members from each State, would "'be disinclined to invade the rights of the individual States, or the prerogatives of their governments.'" *Garcia*, 469 U.S. at 551 (quoting The Federalist, No. 46, p. 332 (B. Wright ed., 1961)). Madison "placed particular reliance" on the Senate, which, because the States are equally represented therein, is "'at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residual sovereignty.'" *Id.* at 551-552 (quoting The Federalist, No. 62, p. 408 (B. Wright ed., 1961)).

But States have no occasion to protect "the prerogatives of their governments" from federal preemption if the bill under consideration in Congress does not purport to preempt state law. This case illustrates the point. The Act's saving clause expressly preserves common-law remedies, and therefore no State opposed to the preemption of state tort claims would have voiced those concerns in the run up to the Act's passage. Congress knows well how to require "obstacle" preemption expressly, see, *e.g.*, 21 U.S.C. § 350e(e)(1)(B) (state "requirement" "is pre-empted if" "as applied and

enforced[, it] is an obstacle to accomplishing and carrying out this section or a regulation prescribed under this section"); 49 U.S.C. § 5125(a) (same), and the bill that became the Act did not do so.

2. The fact that the Act "'legislate[s] * * * in a field which the States have traditionally occupied'" also counsels against preemption, particularly without express congressional authorization. *Wyeth*, 129 U.S. at 1194 (quoting *Lohr*, 518 U.S. at 485) (omission in original); see also *id.* at 1200 ("case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them'") (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-167 (1989) (brackets in original)); *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2720 (2009) (declining to "minimize[]" "the incursion that the Comptroller's regulation makes upon traditional state powers").

Providing legal redress for accident victims is a long-established, sovereign prerogative of the States, whose police power exists to protect health and safety. See generally *Lohr*, 518 U.S. at 485 (recognizing "the historic primacy of state regulation in matters of health and safety"). And state law has controlled in product-related suits against automakers since well before the Act's enactment in 1966. See, *e.g.*, *Elliott v. General Motors Corp.*, 296 F.2d 125 (7th Cir. 1961) (applying Indiana law); *Ford Motor Co. v. Fish*, 335 S.W.2d 713 (Ark. 1960); *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959); *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951) (applying Virginia

law); *Jastrzembski v. General Motors Corp.*, 100 F. Supp. 465 (E.D. Pa. 1951) (applying Pennsylvania law); *Jones v. Raney Chevrolet Co.*, 197 S.E. 757 (N.C. 1938); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (Cardozo, *J.*). The decision below supplants a significant share of the States' traditional role in this area, without any indication that this is what Congress intended.

B. Extending Obstacle Preemption To Cases Like This One Would Be Unworkable.

Without a clear statement from Congress, the decision below allows courts to preempt state law in an undefined universe of future cases, without any guidance from the Act itself. This not only encourages unpredictability in the law, but it blurs the distinction between the legislative and judicial functions. The Constitution "prohibits one branch [of federal government] from encroaching on central prerogatives of another," *Miller v. French*, 530 U.S. 327, 341 (2000), and it is "the exclusive province of Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation," *TVA v. Hill*, 437 U.S. 153, 194 (1978). As Madison warned, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." The Federalist, No. 47, p. 300 (Clinton Rossiter ed., Signet Classic 2003) (internal markings omitted).

Courts following the decision below—which requires preemption whenever state tort claims "stand as an obstacle" to Congress' supposed "purposes and

objectives," Pet. App. 7 (internal quotations and citation omitted)—must try "to reconstruct how the enacting Congress would have resolved questions about the statute's preemptive effect if it had considered them long enough to reach agreement." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 277 (2000). But this is a perilous task, and courts run the risk of preempting state law when doing so "is less a reflection of congressional intentions and more a form of accidental preemption, based solely on the sensibilities of the Justices." Robert S. Peck, *A Separation-of-Powers Defense of the "Presumption Against Preemption,"* 84 Tul. L. Rev. 1185, 1199 (2010).

1. As an initial matter, the endeavor itself risks treading on the "policy choices and value determinations constitutionally committed for resolution to the halls of Congress." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). One member of the Court has thus warned that "[a] free wheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Gade*, 505 U.S. at 111 (Kennedy, *J.*, concurring in part and concurring in the judgment). Another admonished more recently that "'[p]re-emption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking.'" *Wyeth*, 129 S. Ct. at 1217 (Thomas, *J.*, concurring in the judgment) (quoting *Geier*, 529 U.S. at 911 (Stevens, *J.*, dissenting)).

2. Beyond what appears on the face of the law itself, congressional intent may be difficult to discern. "Federal legislation is often the result of compromise

between legislators and 'groups with marked but divergent interests,'" and "a statute's text might reflect a compromise between parties who wanted to pursue a particular goal to different extents." *Wyeth*, 129 S. Ct. at 1215 (Thomas, *J.*, concurring in the judgment) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002)); see also *Landgraf v. USA Film Prods.*, 511 U.S. 244, 286 (1994) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal."). As an example, Congress might adopt "a statute [that] reflect[s] a compromise in which legislators who wanted stricter federal standards settled for laxer standards in exchange for not displacing state tort actions." Kevin O. Leske & Dan Schweitzer, *Frustrated with Preemption: Why Courts Should Rarely Displace State Law under the Doctrine of Frustration Preemption*, 65 N.Y.U. Ann. Surv. Am. L. 585, 591 (2010). Preempting state law without any clear authority from Congress "risks upsetting the legislative bargains out of which the statutes were hammered." Nelson, *supra*, at 280. And it "leaves Congress, regulated industries, and consumers to guess at whether untested federal laws have displaced state * * * common-law causes of action." Peck, *supra*, at 1187.

C. *Geier* Is The Exception That Proves The Foregoing Rule.

The court below concluded that *Geier* compelled it to preempt California common law, but *Geier* does not control here. The NHTSA rule in that case served the one aim set out on the face of the Act itself—improving vehicle safety. See *supra* p. 2; *Motor Vehicle Mfrs. Ass'n*

v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 55 (1983) ("Congress intended safety to be the pre-eminent factor under the Act."); see also *ibid.* (legislative history confirms Congress' intent that vehicle safety be Act's "'paramount purpose'" and "'overriding consideration in the issuance of standards'" (quoting House and Senate Reports)). The regulatory record showed a clear determination by the agency that vehicles would be safer in the long term if automakers had a choice whether to install airbags in the short term. Here, in contrast, NHTSA considered a host of reasons in declining to require shoulder/lap belts for rear inboard seats, and most of those reasons had nothing to do with promoting vehicle safety. If obstacle preemption should ever apply—and members of the Court have raised serious questions on this score, see *supra* pp. 17-18—then it should apply only in cases, like *Geier*, where state law interferes with an express congressional objective (*e.g.*, safety). Such a limitation minimizes the offense to state sovereignty and gives courts some guidance in displacing state law.

1. In *Geier*, the Court held that a prior version of Standard 208 preempted state tort claims predicated on an automaker's failure to install an airbag. Notwithstanding the absence of a clear statement of congressional intent to preempt, see 529 U.S. at 867-868 (rejecting express preemption), the *Geier* Court determined that a state "no airbag" law would conflict with the Act's articulated goal of promoting safety, see *id.* at 874-875. Indeed, the administrative record showed that NHTSA "deliberately sought variety" among passive restraint devices as the most effective way to improve safety. *Id.* at 878. In NHTSA's view, offering manufacturers "a range of choices among

different passive restraint devices" "would bring about a mix of different devices introduced gradually over time," *id.* at 875, and this, in turn, "would help develop data on comparative effectiveness," "allow the industry time to overcome the safety problems and high production costs associated with airbags," and "facilitate the development of alternative, cheaper, and safer passive restraint systems," *id.* at 879. The standard thus embodied NHTSA's "policy judgment that safety," the Act's one stated purpose, "would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (internal quotations omitted, emphasis in original). Given NHTSA's "affirmative 'policy judgment'" that encouraging installation of a variety of devices would make vehicles safer in the long run, *Sprietsma*, 537 U.S. at 529 (describing facts in *Geier*), the *Geier* Court was willing to overcome the presumption against preemption, find preemption broader than the language of the Act's preemption provision admits, and deprive the saving clause of its full effect.

These aspects of *Geier* may make it a strong candidate for reexamination by the Court at some point. But for now they counsel powerfully for limiting *Geier*'s rule to instances where NHTSA concludes that a more rigorous law would *undercut* the Act's sole, stated aim. It is the difference between requiring that manufacturers have a choice to promote vehicle safety (*Geier*), and declining to limit that choice, for any number of reasons, as part of the federally established "minimum" requirements for manufacturers.

This case falls plainly into the latter camp, and the court below therefore erred in relying on *Geier* to hold

petitioners' state-law claims preempted. There was no showing here that NHTSA sought to promote vehicle safety by giving automakers a choice between lap-only and lap/shoulder belts, much less that more demanding state laws would make passengers less safe. Indeed, as petitioners and the United States ably explain, no such showing is possible on this record. See Pet. Br. 35-39, 48-49; U.S. Br. on Cert. Pet. 9-15. Given the safety benefits associated with lap/shoulder seatbelts, NHTSA actually stated a preference for these belts. See *supra* pp. 3-4; Pet. Br. 36, 37, 40; U.S. Br. on Cert. Pet. 14. The agency only declined to require them as part of the federal "minimum" requirements—not out of concern over safety—but based on an assessment of technical feasibility and cost. See *supra* pp. 3-4; Pet. Br. 39-40; U.S. Br. on Cert. Pet. 14-15.[2] To avoid repetition, we will not elaborate on these points, other than to emphasize that affirmance of the decision below would require the Court to expand its ruling in *Geier* significantly. More broadly, it would require the Court to extend its until-now limited doctrine of obstacle preemption, to the detriment of salutary rules of construction and the federal-state balance.

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[2] *Geier* is distinguishable on the additional ground that DOT argued in favor of preemption there, a fact this Court stressed in its opinion, see 529 U.S. at 883, whereas DOT disfavors preemption here, see U.S. Br. on Cert. Pet. 9, 17.

III. The Act Does Not Seek Nationwide Legal Uniformity, And Preserving State Tort Remedies Risks Little Disuniformity In Any Event.

Finally, *Geier* cited evidence in the Act's legislative history that Congress sought "'a uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.'" 529 U.S. at 871 (quoting House Report). Undoubtedly, respondents will raise this same interest in uniformity as reason to preempt California law here. But the Act itself makes no reference to promoting legal uniformity, and there is nothing for respondents in the legislative history, either. Nor is there reason to predict that state law will yield significant disuniformity in any event.

1. The only published legislative history of the Act is a Senate Report, and this report mentions uniformity only once, when it expresses a preference that "motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 1301, at 12 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2720. In the very next paragraph, however, the Report makes clear that "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care." *Ibid.* The Report's reference to "uniformity" thus appears to stress the need for a uniform federal baseline, not an all-encompassing federal standard that precludes more rigorous state requirements.

In any event, by the time the Act became law, its own language was more definitive than the Report on

the role reserved for state common law. Whereas the Report states that compliance with federal standards would "*not necessarily* shield any person from product liability at common law," *id.* at 2720 (emphasis added), the Act is clear that compliance with federal law "*does not* exempt a person" from common-law liability, 49 U.S.C. § 30103(e) (emphasis added). Indeed, even *Geier* acknowledges that "the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims." 529 U.S. at 871; cf. *Riegel v. Medtronic*, 552 U.S. 312, 326 (2008) (Medical Device Amendments Act preempted state law where former had express preemption provision and no saving clause, and where Court could determine that Act reflected Congress' "solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of all 50 States to all innovations").

In short, because safety—not uniformity—was Congress' stated aim in passing the Act, concerns about the "conflict, uncertainty, [and] cost" that may accrue if state damages remedies are preserved, *Geier*, 528 U.S. at 871, should play no role in the preemption analysis here.

2. Nor is there any reason to believe that state tort suits will lead "to a 'crazy quilt' of [federal] standards or otherwise create[] any real hardship for manufacturers." *Bates*, 544 U.S. at 451-452. Tort claims charging vehicle design defects vary little from State to State. A substantial majority of jurisdictions follow Third Restatement principles, which require plaintiffs to prove more than an auto-related injury;

they must establish the automaker's negligence. See David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 749 (2008) ("[T]he Third Restatement correctly endorses the widespread judicial practice of applying negligence principles * * * as the basis for liability for dangers in product design"); Victor E. Schwartz, et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 937 (2009) ("Courts throughout the United States have largely adopted [Third Restatement] principles, rejecting strict liability for design * * * defects.").

Most jurisdictions thus require plaintiffs to show that "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design * * * and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2(b) (1997). This standard is meant to "achieve the same general objectives as does liability predicated on negligence." *Id.* at cmt. a.[3] It recognizes that "[m]any product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable," and

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[3] Failure-to-warn claims also require a showing of manufacturer negligence under the Third Restatement. See Restatement (Third) of Torts: Products Liability § 2(c) & cmt. a (1997). And this, too, is the prevailing rule among the States. See George W. Flynn & John J. Laravuso, *The Existence of a Duty to Warn: A Question for the Court or the Jury?*, 27 Wm. Mitchell L. Rev. 633, 638 (2000).

requires an "independent assessment of advantages and disadvantages" of increased safety (or "'risk-utility balancing'"). *Ibid.*; see also *id.* at cmt. d. Even the few jurisdictions that have not adopted Third Restatement principles for design-defect claims apply a negligence-like standard. See Owen, *supra*, at 749 ("It [was] an open secret for many years" prior to Third Restatement "that courts have been purporting to apply 'strict' liability doctrine to design and warnings cases while in fact applying principles that look remarkably like negligence.").

3. Not only is there little difference in the law among the different States, but disparity between state and federal law arises only when needed most to promote vehicle safety—that is, when federal standards are outdated or otherwise grossly inadequate. The Third Restatement advises that a product's compliance with applicable safety statutes and regulations is "properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation." Restatement (Third) of Torts: Products Liability § 4(b) (1997). Nearly every State follows this or a similar approach, see Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 Tul. L. Rev. 1203, 1227 & nn. 87-90 (2010), many providing by statute that regulatory compliance creates a rebuttable presumption that the manufacturer is not liable, see, *e.g.*, Colo. Rev. Stat. § 13-21-403(1) (West 2010); Fla. Stat. Ann. § 768.1256(1) (West 2010); Ind. Code Ann. § 34-20-5-1 (West 2010); Kan. Stat. Ann. § 60-3304(a) (West 2009); Ky. Rev. Stat. Ann. § 411.310(2) (West 2009); N.D. Cent. Code Ann.

§ 28-01.4-02 (West 2009); Tenn. Code Ann. § 29-28-104 (West 2010); Tex. Civil Practice & Remedies Code Ann. § 82.008(a) (West 2009).

To be sure, regulatory "compliance does not preclude as a matter of law a finding of product defect" under the prevailing approach. Restatement (Third) of Torts: Products Liability § 4(b) (1997). Such a conclusion "may be appropriate," however,

> when the safety statute or regulation was promulgated recently, thus supplying currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise.

Id. at cmt. e. Thus, state law generally permits manufacturers to use compliance with federal law as evidence in defense of a tort claim and, indeed, as dispositive evidence when the federal regulation was carefully considered and is up to date.

4. In short, "[w]hile it is true that properly instructed juries might on occasion reach contrary conclusions on a similar issue," "there is no reason to think that such occurrences would be frequent or that they would result in difficulties beyond those regularly experienced by manufacturers of other products that every day bear the risk of conflicting jury verdicts." *Bates*, 544 U.S. at 452. And state tort law and federal automobile regulation have co-existed without material conflict for the more than forty years since the Act's

passage. See Vladeck, *supra*, at 1 ("Historically, state tort and damages law have served as a background to state and federal regulatory law."). Manufacturers have been pressing preemption in response to products liability claims only since 1992, when this Court first recognized the defense in such a case. See Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & Pol'y 1013, 1028 (2007) (discussing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)). But there is no evidence that, prior to that time or since, manufacturers have had difficulty complying with federal requirements while also being held accountable to consumers under state law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 08-1314

IN THE

Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,

Respondents.

On Writ of Certiorari
to the Court of Appeal of California,
Fourth Appellate District, Division Three

BRIEF FOR *AMICUS CURIAE* JUVENILE PRODUCTS MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Juvenile Products Manufacturers Association ("JPMA") is a national, not-for-profit organization that represents 95% of the prenatal to preschool industry. Formed in 1962, JPMA's members include more than 250 companies in the United States and North America. JPMA's member companies manufacture, import and/or distribute a wide range of infant products, including child restraint systems. JPMA's membership includes more than a dozen child restraint manufacturers.

JPMA has been recognized for its dedication to enhancing the safety of children's products. JPMA's leadership in juvenile product safety includes the development of a comprehensive Certification Program to help guide parents and other caregivers toward purchasing juvenile products that are built with safety in mind.

JPMA works with government agencies, consumer groups, and industry leaders on programs designed to educate consumers on the safe selection and use of juvenile products. *See, e.g.*, Consumer Product Safety Commission, 66 Fed. Reg. 39692, 39692 (2001) (noting that the Commission asked JPMA "to disseminate the message that caregivers should never leave a baby unattended in a tub of water").

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus* or its members made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties, whose consent letters have been filed with the Clerk.

JPMA has sponsored programs such as Safe & Sound For Baby and Baby Safety Month to keep safety-conscious parents informed.

JPMA has regularly provided comments to the National Highway Traffic Safety Administration ("NHTSA") in connection with rulemaking regarding child restraints. *See, e.g.*, 67 Fed. Reg. 63295, 63295 (2002) (noting that JPMA's comments "represented the views of child restraint system manufacturers"). As JPMA has made clear to NHTSA, "the number one priority of [child restraint] manufacturers is to increase the usage and more importantly the proper use of child restraint systems." 62 Fed. Reg. 7858, 7863 (1997).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the preemptive effect of the Federal Motor Vehicle Safety Standards ("FMVSS"). Prior to the amendments enacted in 1989, NHTSA's seatbelt rule, FMVSS 208, *see* 49 C.F.R. § 571.208, gave vehicle manufacturers the option to install lap-only seatbelts (Type 1 belts) or lap/shoulder seatbelts (Type 2 belts) in rear seating positions. Under the 1989 amendments, NHTSA required Type 2 belts in rear outboard seating positions but preserved the option of installing either Type 1 or Type 2 belts in rear inboard seats.[2]

This case arises from an accident involving a 1993 Mazda MPV Minivan which was equipped with a

[2] The 1989 version of FMVSS 208 is no longer in effect. Since September 1, 2007, FMVSS 208 has required new cars to be equipped with Type 2 seatbelts in almost all rear seating positions.

lap-only belt in its middle row, rear aisle seating position. When the accident occurred, that seat was occupied by Thanh Williamson, the decedent. Plaintiffs' state-law tort suit seeks to hold Mazda liable for failing to install a lap/shoulder belt in the middle row inboard seat,[3] even though FMVSS 208 gave Mazda the option to install a lap-only belt in that seating position.

The meaning—and preemptive effect—of the 1989 revisions to FMVSS 208 cannot be determined by simply considering the amendment itself. The 1989 changes represent but one in a series of adjustments to the 208 standard, and that standard itself is but one in a series of regulations designed to ensure the safety of vehicle occupants, including children. Viewed in context, the 1989 amendments permitting automobile manufacturers to install either Type 1 or Type 2 belts in the rear inboard seats are entirely consistent with a broader child-safety policy the agency adopted years earlier. Beginning in 1980, NHTSA required all child restraint devices to be capable of being secured solely by means of Type 1 belts, and further determined that the safest location for a child restraint is a rear center seat.

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[3] NHTSA distinguishes between "outboard" seating positions, or seats located "less than 12 inches from the innermost point on the inside surface of the vehicle," 49 C.F.R. § 571.3, and "inboard" seating positions, seats located more than 12 inches away. For purposes of FMVSS 208, NHTSA defines a "rear outboard designating seating position" to include any "outboard designated seating position * * * that is rearward of the front seat(s), except any designated seating position adjacent to a walkway that is located between the seat and the near side of the vehicle and is designed to allow access to more rearward seating positions." 49 C.F.R. § 571.208, S4.1.4.2(c).

For years, NHTSA used FMVSS 208, 210, and 213 to implement this child-safety policy. The regulations worked in tandem. FMVSS 213 established design and performance requirements for child restraint systems, along with a rigorous testing regime to evaluate those systems. Following extensive review over nearly a decade, NHTSA decided in 1980 to require that all child restraint devices be capable of installation with only a Type 1 seatbelt. NHTSA's regulation reflected its considered judgment that standardizing and simplifying the means of installation of child restraint devices would promote their use, reduce their misuse, and help keep small children safe.

By the time the FMVSS 213 revision became final in 1980, NHTSA had further concluded that the safest location for a child restraint device was in the rear center or inboard seat of the vehicle. As part of a final rule amending FMVSS 213, NHTSA required all instructions accompanying child safety seats to state clearly that the rear center seating position was the safest place to put a child seat.

Implementing this policy, NHTSA in 1985 revised 213's companion regulation, FMVSS 210, to require that the owner's manual of every vehicle include a statement explaining that child restraint devices were designed to be capable of being secured using Type 1 lap belts and ideally should be placed in the rear center seating position.

FMVSS 208 reflected this same child-safety policy. Prior to 1989, FMVSS 208 permitted Type 1 seatbelts in all rear seating positions. In 1989, NHTSA changed the standard to require Type 2 belts in rear outboard seats, but pointedly refused to require Type

2 belts in rear center seats. Instead, and in keeping with its policy of promoting child-safety seat use in the rear center seats, the agency preserved the manufacturer's option to use either Type 1 or Type 2 belts there—even as NHTSA continued to tell parents that those seats were the safest place for child safety devices. Indeed, as late as 1997, NHTSA observed that child safety seats were designed to be secured with a Type 1 belt, and affirmatively urged parents to place those safety seats in the rear center seating position.

ARGUMENT

NHTSA'S 1989 RULE AUTHORIZING LAP-ONLY BELTS IN REAR CENTER SEATS WAS PART OF A COMPREHENSIVE CHILD-SAFETY POLICY AIMED AT PROMOTING THE USE OF CHILD RESTRAINTS IN THE SAFEST SEATING POSITION.

FMVSS 208 is part of a cluster of safety regulations that include the critical objective of protecting small children riding in automobiles. Under FMVSS 213, NHTSA adopted a comprehensive policy to promote child safety by promoting the use of child restraint devices. As part of this policy, the agency required a standardized means of installing child safety seats—with Type 1 belts—and also advised parents and other caregivers that the placement of child restraints in rear inboard positions was safest. The 1989 revisions to FMVSS 208 did not alter, but were in fact fully compatible with this policy.

A. Background on FMVSS 213, the Child Restraint Standard

FMVSS 213 is NHTSA's child restraint standard.

See 49 C.F.R. § 571.213. The express purpose of FMVSS 213 is "to reduce the number of children killed or injured in motor vehicle crashes." *Id.* § 571.213, S2.

FMVSS 213 establishes both design and performance requirements for child restraint systems. It requires dynamic testing in which the child restraint and a test dummy are crashed into a frontal barrier and subjected to a rapid change in velocity. "The child restraint must manage the force from the simulated crash so that the forces imparted to the dummy are within tolerable limits." NHTSA, 67 Fed. Reg. 21806, 21812 (2002). The FMVSS 213 crash testing "involv[es] a 30 mph velocity change, which is representative of a severe crash." *Id.* at 21809. Indeed, the "30 mph change in velocity is more severe than approximately 98 percent of the frontal impact crashes nationwide." NHTSA, 68 Fed. Reg. 37620, 37640 (2003).

Because FMVSS 213 and the testing it requires are rigorous, FMVSS 213-compliant child restraints "are the most effective vehicle safety measure available for children." NHTSA, 72 Fed. Reg. 65804, 65805 (2007). As NHTSA has recognized:

> When used, child restraints are highly effective in reducing the likelihood of death and/or serious injury in motor vehicle crashes. NHTSA estimates * * * that for children less than one-year-old, a child restraint can reduce the risk of fatality by 71 percent when used in a passenger car and by 58 percent when used in a pickup truck, van, or sport utility vehicle (light truck). Child restraint effectiveness for children between the

> ages 1 to 4 years old is 54 percent in passenger cars and 59 percent in light trucks.

NHTSA, 68 Fed. Reg. at 37622 (citing Hertz, *Revised Estimates of Child Restraint Effectiveness*, NHTSA Research Note (Dec. 1996)).

"The rate of effectiveness for infants in child safety seats in passenger cars means that 71 percent of infants in passenger cars who would die without a child safety seat would survive the crash if they were restrained in a child safety seat." NHTSA, Research Note, Traffic Safety Facts: Lives Saved Calculations for Infants and Toddlers, DOT HS 809 778 (March 2005). *See also* Kahane, An Evaluation of Child Passenger Safety: The Effectiveness and Benefits of Safety Seats, NHTSA Report No. DOT HS 806 890 (Feb. 1986) ("[T]he preliminary conclusion is that all types of correctly used seats reduce fatalities by close to 71 percent and hospitalizations by close to 67 percent.").

FMVSS 213 is by no means a merely "minimal" standard. As noted, FMVSS 213 testing simulates a severe crash, and FMVSS 213-compliant child restraints are highly effective in preventing death or serious injury. To be sure, the Safety Act states that each FMVSS is "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9). But they are minimum standards in the sense that they are *mandatory* standards that manufacturers must meet or surpass. As NHTSA has explained:

> Minimum performance standards do not equate with "minimal" performance standards * * * The word "minimum" in the statutory definition

> of motor vehicle safety standards * * * does not refer to the substantive content of the standards but rather to their legal status—that the products covered must not fall short of them.

41 Fed. Reg. 2391, 2392 (1976). Indeed, under the Safety Act, every FMVSS must achieve a standard of performance for motor vehicles and motor vehicle equipment sufficient to protect "against unreasonable risk of death or injury in an accident." 49 U.S.C. § 30102(a)(8).

B. In the 1980s, NHTSA Adopted the Policy That All Child Restraints Must Be Capable of Being Installed Solely With a Type 1 Seatbelt and Encouraged the Installation of Child Restraints in Rear Inboard Seats.

NHTSA's predecessor, the National Highway Safety Bureau, issued the first version of FMVSS 213 in March 1970, with an effective date of January 1, 1971. *See Motor Vehicle Safety Standard No. 213; Child Seating Systems*, 35 Fed. Reg. 5120 (1970). From the outset, the agency recognized that "[t]he safe performance of a child seating system depends, in large measure, on its proper installation and use." *Id.* at 5120. It also recognized that "[t]he method used to attach a restraint device to the motor vehicle is obviously critical to its safe performance." *Id.* at 5121.

With these considerations in mind, the agency decided that child restraints must be anchored with vehicle seatbelts. *See id.* ("Because seat belts are engineered, manufactured, and installed for the specific purpose of restraining vehicle occupants, and their value for that purpose has been established,

* * * each child seating system must be designed and constructed so that it will be restrained by a seat belt assembly when the system is properly installed."). The first version of FMVSS 213 provided that child restraint systems must be capable of being secured "by a Type 1 or Type 2 seat belt assembly as defined in Federal Motor Vehicle Safety Standard No. 209." *Id.* at 5122 (quoting FMVSS 213, S4.4(b)).

In 1974, NHTSA proposed to revise FMVSS 213. *See* 39 Fed. Reg. 7959 (1974). One of the proposed revisions would have allowed child restraints to be capable of being secured by Type 1 or Type 2 seatbelts or by "belts or belt extensions provided by the restraint manufacturer, if specified belt performance requirements are met." *Id.* at 7960.

NHTSA did not, however, adopt this contemplated revision which would have expanded the list of permissible installation methods. After further study, the agency moved in the opposite direction: it decided in the late 1970s that all child restraint systems must be capable of being anchored solely with Type 1 seatbelts.

In a 1978 notice of proposed rulemaking, NHTSA proposed a new version of FMVSS 213 that would require all child restraint systems to be capable of installation solely with Type 1 seatbelts. *See* 43 Fed. Reg. 21470, 21475 (1978) ("All child restraints, * * * must be capable of being secured to a vehicle with a Type 1 (lap) seat belt as specified in Standard No. 209.") The proposed new version FMVSS 213 stated:

> When installed on a vehicle seat, each child restraint system, other than child harnesses, shall

> be capable of being restrained against forward movement solely by means of a Type 1 seat belt assembly * * *.

Id. at 21486 (quoting proposed FMVSS 213, S5.3.2).

NHTSA's proposed requirement that all child restraints must be capable of installation solely with Type 1 seatbelts reflected NHTSA's considered judgment that simplification of installation would reduce the misuse of child restraints and promote child safety. NHTSA noted that "a concerted effort needs to be made to reduce the problem of misuse of child restraints. Misuse substantially reduces the safety value of these restraints." *Id.* at 21471. And NHTSA reasoned that "[i]f either the attaching of restraints to vehicles or securing of children in the restraints becomes overly complex, the already substantial problem of misuse could be greatly exacerbated." *Id.*

NHTSA concluded that requiring all child restraints to be capable of installation through a uniform, standardized method of installation was critical to avoid misuse:

> Standardization of the means of anchoring a child restraint to a vehicle is vital to prevent misuse. By requiring all restraints to be attachable to vehicle seats by the vehicle seat belt, consumers will be assured of a uniform method of attaching the restraint and there will be less confusion regarding that aspect of use.

Id. at 21472.

NHTSA adopted the new version of FMVSS 213 in December 1979, with an effective date of June 1,

1980. *See* 44 Fed. Reg. 72131 (1979). This 1980 version of FMVSS 213 included the new requirement that "all child restraints be capable of being secured to the vehicle seat by a lap belt." *Id.* at 72136. *See also id.* at 72149 (publishing FMVSS 213, S5.3.2).

NHTSA reiterated that standardizing the means of installation of child restraint systems—by requiring all child restraints to be capable of being installed solely by Type 1 belts—was important to achieve proper use of child restraints. *See id.* at 72136 ("Standardizing all restraints by requiring them to be capable of being attached by a lap belt is an important way to prevent misuse."). During this time period, as NHTSA noted in 1984, "most child restraints are designed to be used only with lap belts." 49 Fed. Reg. 15241, 15241 (1984).

By the time of the 1980 revision to FMVSS 213, NHTSA had also concluded that the safest location for a child restraint was a rear center seat. In its 1978 notice of proposed rulemaking, NHTSA proposed that the instructions accompanying child restraints should "be required to state that the center rear seating position in passenger cars is the safest seating position and that child restraints should therefore be installed in that position." 43 Fed. Reg. at 21476. Adopting the proposal in December 1979, NHTSA explained that "[a]ccident data have consistently shown that the occupants in the rear seat are safer than occupants in the front seat. The same data show that the center rear seating position is the safest seating position in the rear seat." 44 Fed. Reg. at 72137. Thus, as of 1980, NHTSA required the manufacturer's instructions for installing a child restraint to state that "the rear

center seating position is the safest seating position in most vehicles for installing a child restraint system." *Id.* at 72150 (quoting FMVSS 213, S5.6.1).

The twin NHTSA policies expressed in the 1980 version of FMVSS 213—that all child restraints should be capable of being installed solely with a lap belt and that the rear center seating position is the safest place for a child restraint—were also expressed during the mid-1980s in NHTSA rulemaking under FMVSS 210, which governs seatbelt assembly anchorages. *See* 49 C.F.R. § 571.210. In October 1985, NHTSA amended FMVSS 210 to require the owner's manual in every vehicle to include a section "explaining that all child restraint systems are designed to be secured in vehicle seats by lap belts or the lap belt portion of a lap-shoulder belt." 50 Fed. Reg. 41356, 41359 (1985) (quoting FMVSS 210, S6(a)). NHTSA also required a statement alerting vehicle owners "that, according to accident statistics, children are safer when properly restrained in the rear seating positions than in the front seating positions. In a vehicle with a center rear seating position, the owner's manual shall state that *the center rear position is the safest.*" *Id.* (quoting FMVSS 210, S6(b) (emphasis added)). NHTSA based this requirement on "crash tests and accident data which show that the center rear seat is safer, particularly in side impacts, than other seats." 51 Fed. Reg. 29552, 29554 (1986).[4]

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[4] Without retreating from its position that a rear center seating position is the safest location for a child restraint, NHTSA subsequently agreed with a petitioner that "depending on how a child is restrained and the severity of the crash, it is possible for a restrained child in the center rear seat of a bucket seat vehicle to strike a portion of the vehicle's interior in front

C. NHTSA's 1989 Amendment to FMVSS 208 Was Consistent With the Agency's Child-Safety Policies Under FMVSS 213.

In the 1980s, NHTSA determined that requiring a simplified and standardized means of installing child restraints—with lap-only Type 1 belts—promoted child seat use, reduced misuse, and was important to child safety. It also determined that parents and caregivers should be informed that the rear center seat is the safest place for a child restraint system. NHTSA implemented these policies through FMVSS 213.

NHTSA's 1989 revisions to FMVSS 208 were entirely consistent with these policies. The 1989 revisions permitted manufacturers to install Type 1 belts in rear center seating positions, thus ensuring the availability of that option for parents and caregivers who wished to install child restraints with such belts in those seats.

In this respect, the FMVSS 208 revisions marked no sea change. Even after the 1989 amendments, NHTSA continued to mandate, per FMVSS 213, that child restraint systems "shall be capable of being restrained against forward movement *solely* by

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of the child." 51 Fed. Reg. at 29554. For that reason, NHTSA "deleted the requirement in S6(b) [of FMVSS 210] that manufacturers state that the center rear seat is the safest seating position." *Id.* Yet FMVSS 213, S5.6.1 continued to require child restraint system instructions to state that the rear center position is safest for child restraints. *See* 51 Fed. Reg. 5335, 5339 (1986) (amending FMVSS 213, S5.6.1 to provide: "The instructions shall state that, for maximum safety protection, child restraint systems should be installed * * * in the center rear seating position in vehicles with such a seating position.").

means of a Type 1 seat belt assembly * * * ." 49 C.F.R. § 571.213, S5.3.2 (1993) (emphasis added).

Even after the 1989 amendments to FMVSS 208, NHTSA continued to adhere to its policy that child restraints should be capable of being installed solely with Type 1 belts and that the rear center seat was safest.[5] In January 1991, NHTSA stated: "Standard No. 213 requires that child restraint systems meet specific performance requirements *when only a lap belt is used*. Accident data show that child restraints meeting current requirements already provide a high level of child protection without the use of shoulder restraints." 56 Fed. Reg. 3064, 3064 (1991) (emphasis added). NHTSA explained that, "even as more rear outboard seating positions of vehicles on the road have shoulder restraints, *the safest position for the child restraint (the center rear position) will not be equipped with shoulder restraints.*" *Id.* (emphasis added). *See also* NHTSA, Child Passenger Safety Resource Manual 88 (Mar. 1992) ("[B]ased on statistical evidence, the rear seat is generally the safer place for a child to be. * * * The center rear seat is farthest from possible intrusion in side impacts.").

The next year, in May 1992, NHTSA reaffirmed its policy requiring standardization of the means of

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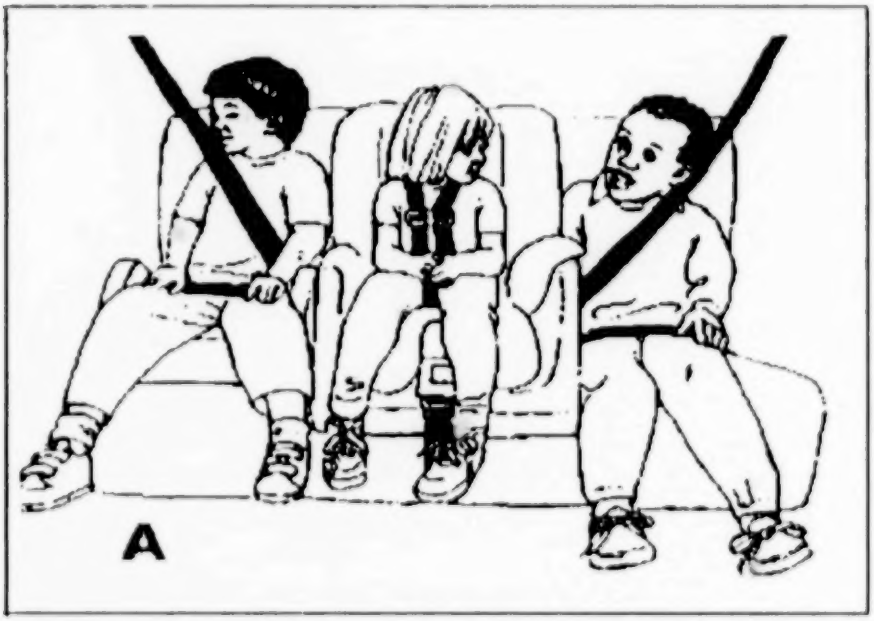
[5] In 1999, NHTSA adopted a rule requiring motor vehicles to be equipped with a new standardized method of installing child restraints with an anchorage system independent of the vehicle seatbelts. *See* 64 Fed. Reg. 10786 (1999). At the same time, NHTSA mandated that "[e]ach child restraint will also have to continue to be capable of being attached to a vehicle by way of the vehicle's belt system. This way, child restraints that have the new components can still be used on older model vehicles that do not have a child restraint anchorage system." *Id.* at 10788.

installing child restraints with Type 1 belts. *See* 57 Fed. Reg. 22682, 22685 (1992) ("Standard 213 standardizes the means for attaching child restraints by requiring all of them to be capable of being attached to the vehicle seat and providing the required protection using only the vehicle lap belt.").

In the 1990s, NHTSA continued to advise parents and caregivers that the rear center seating position—the place where a lap-only belt would be—was the safest spot for a child restraint. In a publication entitled "NHTSA Safety Tips for Using Child Restraint Systems," NHTSA included an image of a child restraint in the rear center seating position secured by a lap-only belt and advised that "[t]he center belt works best for a safety seat."



The back seat is safer than the front. The center belt works best for a safety seat. Older children should use lap/shoulder belts for best protection.

See NHTSA Safety Tips for Using Child Restraint Systems, *printed in* National Transportation Safety Board, Safety Study: The Performance and Use of Child Restraint Systems, Seatbelts, and Air Bags for Children in Passenger Vehicles, Vol. 1, Appendix A (Sept. 1996) (available at http://www.ntsb.gov/publictn/1996/ss9601.pdf).

As late as 1997, NHTSA observed that "[c]hild seats are generally designed to attach to a vehicle by means of the vehicle's lap belt system" and confirmed that "child seats provide high levels of safety when correctly attached to a standard vehicle seat assembly with only a lap belt." 62 Fed. Reg. at 7859.

NHTSA's emphasis during the 1990s on the use of Type 1 lap-only belts to secure child restraints in rear center seats repudiates the Government's suggestion that NHTSA would have been perfectly happy if manufacturers had *immediately* switched to Type 2 belts in 1989. Instead, the regulatory history underscores that NHTSA intended to give manufacturers the genuine option of installing either a Type 1 or Type 2 belt for the rear inboard seats in view of the unique safety concerns presented by small children and child restraints.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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DELBERT WILLIAMSON, ET AL.,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Three

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENT MAZDA MOTOR OF AMERICA

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BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 101 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Appendix A lists PLAC's corporate members.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION

Traditional preemption principles forbid a state jury from rewriting a federal motor vehicle safety standard. In this case, Petitioners' liability claim presents a direct, actual conflict with Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") in effect when the Mazda made Petitioners' MPV Minivan in 1993. This case, therefore, is a text book example of conflict preemption: a state law cannot impose liability on conduct authorized by federal regulation. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 37 (1996) (concluding that "ordinary legal principles of pre-emption" prevent a state law from prohibiting activity that federal law explicitly authorized).

In 1993 FVMSS 208 *required* automobile manufacturers to use one of two types of seatbelts for all rear, inboard seats: Type 1 (lap only) or Type 2 (lap/shoulder). Petitioners could not dispute that a state lawsuit or regulation would be preempted if it sought to declare both of FMVSS 208's options unsafe and defective.

The answer is no different when Petitioners seek to declare one of FMVSS's 208 permitted options unsafe. If FMVSS 208 were not given preemptive effect, there would be no backstop to prevent states, or different counties within the same state, from striking *both* options as "unsafe." The next lawsuit could just as easily target Type 2 seatbelts as unsafe for that particular plaintiff and accident.

This case is more rudimentary than *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). In *Geier*, the Court held that a general federal safety policy permitting, but not requiring, the use of

airbags preempted a state common-law tort claim — even though the state tort law claim did not directly conflict with the federal regulation. Here, the federal government's regulation mandated compliance with one of two seatbelt options; there is a direct conflict if the state were to declare one of those seatbelts unsafe.

Not only does Petitioners' claim directly conflict with FMVSS 208, but allowing Petitioners' claim to continue would undermine several policies underlying both the National Traffic and Motor Safety Act ("Safety Act"), which authorized the National Highway Traffic Safety Administration ("NHTSA") to promulgate automotive safety standards, and FMVSS 208. Congress made NHTSA the expert to improve vehicle safety by balancing safety, cost, consumer acceptance, and technological feasibility. There was no perfect answer as of 1993—nor is there now[2]—for the type of seatbelt to use for rear, inboard, aisle seats of minivans. Consequently, NHTSA's expert judgment, much like with the introduction of passive restraints, was to authorize specific options. It was a deliberate policy decision.

Preemption recognizes Congress's decision to let NHTSA decide. A lay jury may not usurp the policy decisions made by federal experts to set the appropriate types of seatbelts for rear, inboard, aisle

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[2] In fact, NHTSA is still, even today, evaluating what the best seatbelt options are for children in passenger vehicles. *See* 75 Fed. Reg. 53734 (Sept. 1, 2010) (explaining that NHTSA is collecting data on child restraint devices, including seatbelt fit, to ensure that optimal child safety is reached). In short, despite all of the additional research that has been conducted since 1989, NHTSA has still not determined what seatbelt options best protect children.

seats, considering all types of passengers, vehicles, and accident scenarios. The Safety Act reflects Congress's goal of national uniformity of federal standards when NHTSA has acted.

Finally, manufacturers have a right to rely on FMVSS 208 when designing a vehicle. Petitioners' claim, if allowed, threatens to impose repeated, retroactive tort liability upon manufacturers for using a type of seatbelt specifically authorized by the federal government.

In short, Petitioners' claim is preempted on two grounds: their claim directly conflicts with FMVSS 208, and their claim would significantly frustrate the policies underlying the Safety Act and FMVSS 208.

BACKGROUND

Petitioners' claim arises from a highly unusual accident. Delbert Williamson was driving a 1993 Mazda MPV Minivan in which Mr. Williamson's wife Thanh and seven-year-old daughter Alexa were passengers. Pet. Br. 16-17. A motor home, traveling in the opposite direction, was towing a Jeep Wrangler. The Jeep came loose and struck the Williamsons' van. *Id.* at 17. The collision caused fatal internal injuries to Mrs. Williamson from the lap belt. *Id.* For unknown reasons, Mrs. Williamson sat in the rear, inboard, aisle seat wearing a Type 1 belt. Alexa was sitting in the rear outboard seat wearing a Type 2 lap-shoulder belt. The van had three other seats with Type 2 belts.

Petitioners' claim that Mazda's minivan was unsafe and defectively designed because Mazda chose to install a Type 1 rather than a Type 2 seatbelt in the rear, inboard, aisle seat. There is no dispute that

FMVSS 208 as of 1993 authorized Mazda to use a Type 1 belt for that seating position.

Both the California Superior Court and the California Court of Appeal determined that "FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option." Resp. Br. 15 (quoting opinion of California Court of Appeal). Therefore, the Court of Appeal affirmed the dismissal of Petitioners' Complaint.

Congress enacted the Safety Act in 1966 to protect the public "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles, and . . . against unreasonable risk of death or injury in [an accident.]" 15 U.S.C. § 1391(1). Congress intended the safety standards promulgated under the Safety Act to be "uniform national standards." *Wood v. General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988). The Senate Report on the Act emphasized that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 89-1301, at 12 (1966). Otherwise, as President Johnson noted: "The only alternative is unthinkable – 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14,253 (1966).

The Safety Act directs the Secretary of Transportation to establish federal motor vehicle safety standards which "shall be practicable, [and] meet the need for motor vehicle safety." 49 U.S.C. § 30111(a). This duty is in turn delegated to NHTSA.

The "practicability" requirement compels NHTSA to consider factors "including technological ability to achieve the goal of a particular standard as well as . . . economic factors." H.R. Rep. No. 89-1776, at 16 (1966). Thus, safety, technological feasibility, consumer acceptance, and economic factors are important in the development of NHTSA policy and FMVSS regulations. *See Geier*, 529 U.S. at 878-79.

FMVSS 208 is a comprehensive regulation detailing requirements for occupant crash protection. The purpose of FMVSS 208 is vehicle safety: "to reduce the number of deaths of vehicle occupants . . . by *specifying equipment requirements* for active and passive systems." 49 C.F.R. § 571.208, S2 (emphasis added). The Safety Act and FMVSS recognize the necessity for tradeoffs, and for NHTSA to make those complex engineering and policy determinations. It has the expertise, experience, and political authority to make those Solomonic decisions.

Under the version of FMVSS 208 in effect in 1993, both Type 1 (lap) and Type 2 (lap/shoulder) were approved seatbelts for rear, inboard seats. 49 C.F.R. § 571.208, S4.1.4. NHTSA believed that Type 1 belts would improve child safety in the rear, inboard, aisle seat and also not block access to the third row seats. It concluded that children would often sit in the rear, inboard, aisle seat, that a lap belt would work more effectively with child restraint systems, and that a lap/shoulder belt presented safety dangers to smaller children. NHTSA's determination represented its best judgment, balancing considerations of safety for every size, gender, and age of passenger, as well as likely accident conditions, technical feasibility at the time, cost, consumer acceptance, and need for more

field data comparing the relative efficacy of the two alternatives.

NHTSA's deliberate decision to provide two options for rear, inboard seating resulted from at least two decades of rulemaking experience. In 1967, FMVSS 208 required manufacturers to install Type 2 seatbelts in front outboard seats, but provided manufacturers with the option to install either Type 1 or Type 2 seatbelts in other seats. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). Although no official explanation of this policy decision was released then, the decision not to require Type 2 seatbelts in every seating position centered around safety, consumer use, and technology concerns. First, child seats of the time were more compatible with Type 1 belts. 35 Fed. Reg. 14941, 14942 (Sept. 25, 1970); *see also* 49 Fed. Reg. 15241, 15241 (Apr. 18, 1984) (explaining that "most child restraints are designed to be used with only lap belts"). Second, the public saw Type 2 belts as uncomfortable and ill fitting. 41 Fed. Reg. 54961, 54962 (Dec. 16, 1976) (explaining that shoulder belts were a chief source of complaints, "contribut[ing] substantially to the public's complaints of lack of comfort and fit"). Consequently, they were not used as often as Type 1 belts. *See* 44 Fed. Reg. 77210, 77212 (Dec. 31, 1979) (explaining that only 7% of women were more likely to wear a lap-shoulder belt because of the "existence of greater problems of chest fit and pressure for women); 52 Fed. Reg. 22818, 22819 (Jun. 16, 1987) (noting that front seat belt use was five times rear seat usage in 1981-1982).

In the 1980s, NHTSA again considered the issue of requiring Type 2 seatbelts in all rear seats, but

rejected this proposal largely because of concern for child safety with Type 2 belts. 49 Fed. Reg. 15241, 15242 (Apr. 18, 1984). In 1987, NHTSA once more re-examined whether Type 2 belts should be required for all rear seating. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989).

Ultimately, as of 1993, NHTSA had determined that it would require manufacturers to place Type 2 belts in all rear, outboard seats, but not rear, inboard seats. It rejected a rule requiring Type 2 belts in all rear seats. Why? To gain more consumer use of seatbelts, to protect children better, to allow technology to improve and cost to decline, and to obtain more real-world data—all reasons authorized by Congress in the Safety Act, and reasons fit for an expert agency to weigh and balance from a national perspective.

NHTSA's decision to allow Type 1 or Type 2 seatbelts in rear, inboard seats reflects the fact that neither type provides the maximum degree of safety in all situations for all individuals. There were safety trade-offs for both options. As discussed in detail in Respondent's Brief (Resp. Br. at 6-14, 31-38), NHTSA was concerned with three areas: (1) child safety, (2) aisle seat safety, and (3) technical challenges and costs. Notably, NHTSA expected no deaths to result from the use of Type 1 belts for rear, inboard seats. 54 Fed. Reg. 25275 (June 14, 1989) ("A number of studies . . . have evaluated thousands of cases and repeatedly concluded that lap-only belts are, in fact, substantially effective in preventing deaths and reducing injuries.")

In the end, NHTSA concluded that "there would be small safety benefits and substantially greater costs"

to require Type 2 belts for rear, inboard seats. 53 Fed. Reg. 47982, 47984-85 (Nov. 29, 1988). Moreover, as NHTSA explained: "Requiring significant industry and agency resources to be spent for relatively little safety gain *can result in a lost opportunity to better improve vehicle safety through other means*, such as improved frontal or side impact protection." 52 Fed. Reg. 22818, 22819 (June 16, 1987) (emphasis added).

ARGUMENT

As Article VI of the United States Constitution provides, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Consistent with that constitutional command, this Court has long recognized that state laws that conflict with federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

This case presents a question of implied conflict preemption under the Supremacy Clause. Implied conflict preemption looks for an actual conflict between federal law and state law. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). An actual conflict exists when a state law frustrates federal regulation and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Petitioners' claim is impliedly preempted because their claim directly conflicts with FMVSS 208. Petitioners' claim is also preempted because it would significantly frustrate the policies underlying the Safety Act and FMVSS 208.[3]

I. PETITIONERS' STATE LAW TORT CLAM DIRECTLY CONFLICTS WITH FMVSS 208.

Through FMVSS 208, NHTSA had authorized a manufacturer in 1993 to choose one of two specified options when selecting a seatbelt for rear, inboard seats. *See* 49 C.F.R. § 571.208. A manufacturer could not choose to use another type of seatbelt or active restraint system not articulated in the regulation for use in rear, inboard seats without violating federal law. *See* 49 C.F.R. § 571.208. As a result, the plain language of FMVSS 208 authorized manufacturers to use Type 1 belts in rear, inboard seats of automobiles. *Id.* (providing that manufacturers must choose between Type 1 or Type 2 belts for this seating position).

Allowing a state to impose liability on a manufacturer for the use of a Type 1 seatbelt would directly conflict with FMVSS 208 and thus is preempted. *See Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996) (noting that a direct conflict exists where federal law authorizes activity that state law "expressly forbids"); *de la Cuesta*, 458 U.S. at 156 (holding that state law may not forbid the

[3] Petitioners attempt to rely on a presumption against preemption to jump to a conclusion without any rigorous analysis of whether their position is correct. As a result, their reliance on a presumption amounts to nothing more than a post hoc rationalization to avoid the weighty legal and policy arguments that Petitioners cannot overcome.

use of a contract term expressly authorized by a federal regulation); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) ("'It would be inconsistent with [federal] policy . . . if local authorities retained the power to decide' whether the carriers could do what [federal law] authorized them to do.") (quoting *City of Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 87 (1958)).

The fact that NHTSA has authorized a manufacturer to choose among two types of seatbelts to comply with a regulation does not mean that a state may preclude the manufacturer from choosing one of those options. *See Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 383 (7th Cir. 2000); *see also Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Because Plaintiff sued Defendants for exercising an option explicitly permitted by Congress, a conflict exists between state and federal law if Plaintiff goes forward with this state law claim of defective design."). Congress empowered NHTSA to make that safety decision; a state jury may not second-guess NHTSA's decision to permit an option.

If states were permitted to eliminate through common law liability one option that federal law expressly sanctions, nothing would prevent states from eliminating the other option as well, or even requiring a more aggressive belt restraint system. Congress, through NHTSA, did not intend to permit states to pick and choose which federally authorized option would be amenable to each individual state or any particular jury within a state. Such a result would not only destroy any semblance of uniformity, but would subject automobile manufacturers to

different design standards in each state or potentially multiple standards within the same state.[4]

For example, under the regime that Petitioners advocate, a jury in California might decide that a Type 2 belt is necessary to meet a common-law duty of care; meanwhile, a jury in Ohio might decide in another accident that a Type 2 belt is dangerous and defective. Jury by jury, each FMVSS option could be eliminated. Juries look microscopically at one accident, one plaintiff, and one set of injuries.

However, to improve safety nationally, Congress directed NHTSA in setting FMVSS to consider all sizes, ages, genders, and conditions of passengers, all conceivable accident scenarios, and the probability, extent, and nature of all possible injuries. NHTSA has the engineering expertise, national field and test data, and macro overview that a single jury does not have. To make safety work, NHTSA must also assess consumer acceptance, feasibility, and cost—again from the viewpoint of the national good. NHTSA

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[4] This practical result is one reason that Petitioners are wrong to argue that tort liability would supplement FMVSS 208. The Supreme Court has recognized the intersection of preemption and the federal government's commerce power, stating that it is "not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements." *United States v. Locke*, 529 U.S. 89, 115 (2000). The goal of uniformity, while not dispositive, must be considered when deciding whether concurrent regulation is appropriate. *Id.* As Justice Holmes stated: "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

must make a judgment for the greater good, recognizing the safety benefits and risks for each option. Recognizing those tradeoffs, it allowed a choice to manufacturers and consumers in FMVSS 208.

NHTSA's determination to authorize seatbelt options for rear, inboard seats is explicit federal law and a deliberate policy decision. That someone might be harmed by it is an unfortunate but inevitable consequence of the power that Congress invested in NHTSA. In fact, phasing in airbags likely cost some lives, but saved others. So, too, the current mandate for airbags kills or injures some, while saving others from harm.[5] Because imposing tort liability on Mazda arising from its exercise of a federally-authorized choice conflicts with FMVSS 208, Petitioners' claim is preempted.

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[5] Despite the fact the airbags are now viewed as important for safety, several lawsuits have been, and continue to be, initiated claiming that airbags are unsafe. *See generally Gaudio v. Ford Motor Co.*, 976 A.2d 524, 531 (Pa. 2009) (administrator of a deceased motorist's estate claims that air bag deployed at too low of a speed, or too late, and that if air bag would not have deployed at all, the deceased would have suffered only minor injuries); *Platow v. Ford Motor Corp.*, No. ESX-L-1288-99, 2005 WL 3663928, at * 1 (N.J. Super. Ct. App. Div. Jan. 17, 2006) (driver claiming that his quadriplegia resulted from the driver's violent contact with the deploying air bag); *Alves v. Mazda Motor of Am., Inc.*, 448 F. Supp. 2d 285, 288 (D. Mass. 2006) (driver alleges that air bag deployed in low-speed crash and hit her in the eyes, causing her to become blind); *Fisher v. Ford Motor Co.*, 224 F.3d 570, 572 (6th Cir. 2000) (force of the deploying air bag from the steering column into the driver's face slammed her head back against the seat, causing injuries to her head).

This appeal presents a stronger case of implied conflict preemption than *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), because *Geier* did not involve a direct conflict. At issue in *Geier* was FVMSS 208's passive restraint program. *Id.* at 879. The regulation required manufacturers to install some type of passive restraint, such as airbags or automatic seatbelts, in at least 10% of its cars by model year 1987. 49 C.F.R 571.208.S4.1.3.1. The rule did not require auto manufacturers to install any particular type of restraint and did not limit manufacturers' choices. *See id.* Manufacturers could install automatic seatbelts, airbags, or any other suitable passive restraint technology so long as it met the minimum performance standards. *See id.*

In *Geier*, nevertheless, the Court held that FVMSS 208 preempted state tort lawsuits that would frustrate the objectives of the federal passive restraint regulation. The Court noted that the Secretary of Transportation had rejected an all-airbag standard in favor of a more gradual phase-in of passive restraints. *Id.* at 879. The objective of FVMSS 208 was to provide manufacturers "a range of choices among different passive restraint devices" so as to "bring about a mix of different devices introduced gradually over time." *Id.* at 875. In that way, the federal government best believed that it could maximize safety. The Court thus held that FVMSS 208 preempted a state tort lawsuit claiming that Honda should have installed an airbag in plaintiff's car. The Court held that, "by its terms [such a lawsuit] would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems . . . [and] thereby would

have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881.

In Petitioners' attempt to strike against preemption when an FMVSS allows options, Petitioners fundamentally misconstrue *Geier*. The plaintiff in *Geier* did not challenge the effectiveness of *another* approved passive restraint system. In fact, as the Court states, *the car in* Geier *was not equipped with any passive restraint system.* *Id.* at 865. Thus, the *Geier* plaintiff's lawsuit did not seek to have one option declared unsafe in favor of another. There was no direct conflict with the language of the regulation, and the Court could not have relied solely on the fact that Honda had installed a permitted option.[6] The conflict in *Geier* instead came from the frustration of the purpose of FMVSS 208.

To be sure, had the plaintiff sought to declare automatic seatbelts unsafe, even the dissenting justices in *Geier* likely would have concluded that the lawsuit was preempted. The dissent explains that, in its view, preemption would be required "of course, if Petitioners had brought common-law tort claims challenging Honda's compliance with a mandatory minimum standard -- *e.g.*, claims that a 1999 Honda was negligently and defectively designed *because* it was equipped with airbags as required by the current

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[6] Likewise, in *Wyeth v. Levine*, the plaintiff did not attempt to remove, through tort liabilkity, an approved method for administering the drug. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (1009).

version of Standard 208." *Id.* at 893 n.6 (Stevens, J., dissenting).

Honda's preemption argument prevailed in *Geier,* even though there was no direct conflict. The argument against Petitioners' case here is much easier. Here, because there is a direct conflict between the regulation's requirements and state tort law, the state tort suit is preempted. No further analysis is needed.[7]

II. PETITIONERS' COMMON LAW CLAIM FRUSTRATES NHTSA'S POLICY DECISIONS MADE IN FMVSS 208.

When a state tort lawsuit would interfere with a federal objective, the lawsuit is preempted.[8] *Geier,* 529 U.S. at 881. Petitioners cannot evade preemption by asserting that FMVSS 208 is a minimum safety standard. It is not. FMVSS 208 is a regulation with explicit, limited options for seatbelts. Accordingly, Petitioners' lawsuit, if permitted, would

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[7] In their brief, Petitioners assert that NHTSA encouraged manufacturers to install Type 2 belts in rear inboard seats. *See generally* Pet. Br. 11. Although that statement is part of the legislative history, it is not found in the actual language of FMVSS 208, which specifies the two options with no further limiting language. The passive retraint rule in *Geier* also encouraged the use of passive restraints, but that encouragement did not preclude preemption.

[8] There can be no dispute here that the preemptive effect of FMVSS 208, like a product defect, must be judged by the rule in effect when the product was made, not based upon later changes in the law and technology. The fact that this regulation was changed 11 years after Petitioner's vehicle was manufactured and 15 years after this portion of FMVSS 208 was enacted has no bearing on the Court's analysis.

frustrate federal policy as set in NHTSA's safety standard.

A. Following *Geier*, NHTSA's policy decisions embodied in FMVSS 208 impliedly preempt Petitioners' claim.

The Court in *Geier* determined that plaintiff's state common-law tort claims conflicted with FMVSS 208's passive restraint policy. It analyzed NHTSA's cost, safety, and technological policy decisions supporting the adoption of FMVSS 208's passive restraint regulation. 529 U.S. at 875-79. The Court examined the safety concerns, noting that NHTSA had rejected an all-airbag standard due to "safety concerns (perceived or real) associated with airbags." *Id.* at 879 (citing 49 Fed. Reg. 28990, 29001 (1984)). The Court also considered the fact that NHTSA had authorized manufacturers to choose among different technologies that would allow for the development of comparative performance data and would facilitate development of alternative, cheaper, and safer technologies. *Id.* (citing 49 Fed. Reg. 28990, 29001-02 (1984)). Finally, the Court observed that the asserted common-law duty to provide airbags would present an obstacle to the mix of technologies and manufacturer choice intended by the federal safety standard. *Id.* at 881. Ultimately, because the state tort law claim would interfere with, and obstruct the accomplishment and execution of, the important federal objectives embodied in FMVSS 208's passive restraint policy, the plaintiff's claim was held to be preempted. *See id.*

Geier establishes that a federal regulation based on an agency's balancing of safety, costs, consumer acceptance, and technological concerns is a legitimate

federal objective deserving preemptive effect. This principle is hardly novel; even the states have regularly accepted it. *See, eg.*, Priester v. Cromer, --- S.E.2d ---, 2010 WL 2990978 (S.C. Aug. 2, 2010) (concluding that plaintiff's state tort law claim, that her truck was defectively designed because the manufacturer selected one of the federally authorized choices for glass outlined in FMVSS 205, was preempted and thus reasoning that such a result would stand as an obstacle to achieving the purposes and objectives of FMVSS 205); *Morgan v. Ford Motor Co.*, 224 W.Va. 62, 79 (W. Va. 2009) (concluding that plaintiff's state tort law claims were preempted because "FMVSS 205 permits the manufacturer to make a choice between available safety options for side-window glass; a design defect claim would foreclose choosing one of those options"); *Frith v. BIC Corp.*, 863 So. 2d 960, 967 ¶17 (Miss. 2004) (en banc) (concluding that plaintiff's claim failed as a matter of law because its effect was to punish the manufacturer for selling a certain product — a lighter that a ten-year-old could operate — when the federal government had determined such product was safe enough and should continue on the market)

In FMVSS 208, NHTSA created a comprehensive regulatory system for occupant protection. Petitioners' attempt to narrow the focus to a small portion of this regulation to establish that these two options have limited meaning is disingenuous. Through FMVSS 208, NHTSA has exercised its best judgment, based on decades of rulemaking experience and real world, national data, to achieve the proper balance between considerations of safety, cost, effectiveness, and personal convenience in all types of

occupant restraint systems. The decision to require Type 1 or Type 2 belts in rear, inboard seats is one of those decisions that NHTSA made to ensure that occupant protection as a whole is maximized. One unusual, tragic accident is no reason to allow juries to interrupt and disrupt NHTSA's policy decisions and to create chaotic uncertainty in federal preemption law.

FMVSS 208's active restraint policies, like its passive restraint policies, were developed because of NHTSA's balancing of safety, costs, consumer use, and technological feasibility. In its continual re-evaluation of FMVSS 208, NHTSA examined decades of research investigating appropriate seatbelts for rear, inboard seats. NHTSA's decision to allow Type 1 or Type 2 seatbelts in rear, inboard seats reflects the fact that neither type provides the maximum degree of safety in all situations for all individuals. There were acknowledged safety trade-offs for both options.

First, with regard to safety concerns, NHTSA recognized that Type 2 belts may have safety benefits for some adults, but would have serious safety drawbacks for younger, smaller children – the most common occupant of rear, inboard seats. NHTSA concluded that "[m]any of these children are not yet big enough to use the shoulder belt, . . . since it could pass over their neck or face." 53 Fed. Reg. 47988, 47989 (Nov. 29, 1988). As a result, NHTSA recommended then that younger children not use the shoulder belt and instead only use the lap belt. *Id.*

Moreover, most child restraints in the late 1980s and early 1990s were compatible with lap belts and

could only be used with lap/shoulder belts with difficulty. *See* NHTSA, Child Passenger Safety Resource Manual 88 (March 1992) (stating that the "center rear seating position," which almost always has a lap belt, "often has a belt that is tightened by hand and therefore usually poses fewer compatibility problems [for child restraints]"); 56 Fed. Reg. 3064, 3064 (Jan. 28, 1991) ("[E]ven as more rear outboard seats of vehicles on the road have shoulder restraints, the safest position for the child restraint (the center rear position) *will not be equipped with shoulder restraints.*") (emphasis added); Comments of MercedesBenz of North America, Inc., docketed as NHTSA 87-08-NOI-021 (July 30, 1987) ("Due to the extremely low occupancy-rate of the rear center seat by adults, plus an improved suitability for fastening child restraint systems, the rear-center seats are equipped with lap belts.").

In sum, Type 2 belts presented NHTSA with a serious safety concern for children that could not be lightly brushed aside. The federal decision to authorize Type 1 belts in rear, inboard seats recognizes the trade-off of risk and the need for more real-world and test data before conclusively requiring only one option.

NHTSA is charged with promulgating nationwide standards that "protect against unreasonable risk of death or injury" in all accident patterns. *See* 15 U.S.C. § 1391(1). With that broader perspective mandated by the Safety Act, NHTSA retained a safety standard that carefully balanced the competing public interests of individuals like Mrs. Williamson with young children who may have been injured or disabled had Type 2 belts been the only

choice. A single jury, which naturally will feel sympathy to the plaintiff before it and dwell on the particular circumstances of the plaintiff's accident, should not be allowed — and under the Supremacy Clause is not allowed — to undo a federal agency's expert decision made in the wider public interest.[9]

Furthermore, because of the option presented in FMVSS 208, consumers have the choice to purchase a vehicle with the type of safety options best suited for them. As one judge aptly explained: "In today's market, the consumer is, in the sense of safety options, a designer. The consumer who wishes protection beyond that required by federal law can obtain that protection for a cost. Other safety options, such as side air bags, roll bars, steel cages, and even bullet proof windows, are available and can be incorporated if the consumer is willing to pay a higher price." *Celucci v. Gen. Motor Corp.*, 676 A. 2d 253, 263 (Pa. Super. Ct. 1996) (Cirillo, J. concurring). Put simply, if Petitioners wanted a car with a Type 2

[9] Additionally, a state tort law is "pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *See Intern'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (concluding that a Vermont law would allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act). Allowing a jury to eliminate one of the options carefully chosen by NHTSA would undermine the methodology that NHTSA utilizes to meet the goals dictated in the Safety Act. In its efforts to optimize national vehicle safety concerns, NHTSA makes deliberate decisions to include options when no one device consistently eliminates injuries and deaths. NHTSA relies upon further technological development, testing, and real-world field data before eliminating or adding any option. A finding that preemption does not apply here would upset NHTSA's methodology for determining which options are best suited for consumers.

belt in the rear, inboard, aisle seat, they could have purchased one. Moreover, Mrs. Williamson, within her own vehicle, had the opportunity to choose to sit in a seat with a Type 2 belt.

Second, the Court in *Geier* validated NHTSA's policy concern for the expense that manufacturers would face in requiring all cars to have airbags. Here, too, NHTSA was concerned with cost to manufacturers, and ultimately consumers. NHTSA estimated that requiring Type 2 belts in rear center seats would cost $109 million in passenger cars and $42 million in minivans and light trucks with little safety gain.

Third, in *Geier*, the Court upheld NHTSA's policy decision to allow the mix of technologies and manufacturer choice because it encouraged manufacturers to develop new and better technologies for safety. Here, too, NHTSA was concerned with encouraging manufacturers to develop new technologies for safety.

NHTSA found that the use of Type 2 belts in inboard, aisle seats created "potential ingress/egress problems . . . for those more rearward seats" because of anchoring of the shoulder strap. 69 Fed. Reg. 70904 (Dec. 8, 2004); *see also* 55 Fed. Reg. 30914, 30915 (July 30, 1990). These technical concerns were not easily solved and in fact took over a decade for manufacturers to develop an appropriate solution. 69 Fed. Reg. at 70909 (explaining that in 2004 NHTSA had allowed manufacturers to install detachable lap/shoulder belts for inboard aisle seats).

Moreover, NHTSA recognized that Type 2 belts in rear, inboard seats would force manufacturers to compromise other safety. For example, the structural changes required for Type 2 belts in these positions would result in "disruptions of the vehicle's cargo carrying area or impede the driver's rearward vision." 53 Fed. Reg. at 47984. By providing manufacturers with an option, NHTSA allowed additional time for manufacturers to design a Type 2 belt for rear, inboard seats that was not only safer, but more technically feasible, more comfortable, and less expensive to consumers.

In short, similar to FMVSS 208's passive restraint regulation, FMVSS 208's active restraint regulation was developed due to NHTSA's deliberate and careful balance of safety, costs, consumer acceptance, and technological feasibility. It would be an odd result for this Court to sustain the preemptive effect of FMVSS 208 in the context of passive restraints, but deny preemptive effect to NHTSA's equally, carefully considered rule for active, rear seat restraints in FMVSS 208. The preemptive effect of each provision of FMVSS 208 would be thrown into a quandary.[10] To uphold NHTSA's policy determination as well as the superior constitutional force of federal law, this Court should hold that FMVSS 208's active restraint regulation preempts Petitioners' state law claim that would conflict with NHTSA's policy objectives.

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[10] For example, would an accident victim injured by a lap/shoulder belt in a rear, outboard seat be allowed to prosecute a state law claim? Or insist that an airbag should have been installed? Or a five-point belt? The preemptive effect of FMVSS 208 and other federal regulations would be parsed line by line, injecting unwarranted uncertainty into the force of, and the ability to rely on, federal law.

B. FMVSS 208 is not a minimum safety standard.

Throughout their brief, Petitioners assert that all FMVSSs are generally defined as "minimum safety standards." As a result, Petitioners contend that these regulations have no preemptive effect. Pet. Br. 27-28. This is not the case. As *Geier* made clear, FMVSSs that grant explicit options to manufacturers to implement federal policy are not minimum safety standards. 529 U.S. at 874-75.

The fact that FMVSS 208 required auto manufacturers to use one of two seatbelt types distinguishes it from a material or minimum safety standard. FMVSS 208 is a safety standard by its very terms: it embodies a policy judgment. If NHTSA did not care to mandate an option, it could easily have said merely that all rear seats must have a passenger restraint. Instead, NHTSA specified the particular restraint design options after careful consideration. In contrast, minimum safety standards create a regulatory floor that a manufacturer must meet. In accordance with such a standard, states have room to mandate more strenuous regulations than the minimum contained within the federal standard but cannot regulate in a manner that conflicts with that federal standard.

For example, *Geier* distinguished FMVSS 105, 49 C.F.R. 571.105, which establishes minimum standards for brake performance and the installation of airbrakes. A lawsuit contending that a car should have included anti-lock brakes, though it would go beyond this minimum standard, would not create a conflict with the federal regulation. Another example of a minimum safety standard is FMVSS 108, 49

C.F.R. § 571.108, which establishes a minimum candlelight standard for vehicle lighting equipment. *See Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398, 399 (8th Cir. 2000); *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 778 (3d Cir. 1992).

But these regulations differ from the explicit options presented in FMVSS 208. It is rare, within the FMVSS, for NHTSA to provide explicit options for vehicle safety equipment. These rare and specific requirements for options reflect a deliberate policy judgment by NHTSA following its balancing of important safety and technological trade-offs. Petitioners' claim seeking to declare Mazda's authorized choice of seatbelt tortious is not creating a more strenuous regulation, but a contrary regulation. Therefore, their claim is preempted.

If Petitioners' assertion were adopted, there would be no further point in providing manufacturers with deliberate, well-researched, and explicit options. State tort law would still hold a manufacturer liable because the federally-authorized option chosen was not the safest restraint available for a plaintiff in that given situation. NHTSA's policy decisions would be for not. However, in the context of FMVSS 208, Congress established NHTSA, not a state jury, as the safeguard- the guardian—over manufacturer design decisions.

A litany of federal and state appellate courts have recognized the preemptive effect of NHTSA's policy-based options in FMVSS 208 and other federal motor vehicle safety standards. *See Carden v. Gen. Motors Corp.*, 509 F.3d 227, 232-33 (5th Cir. 2007); *Griffith v. Gen. Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002); *Moser v. Ford Motor Co.*, 28 Fed. Appx. 168,

171 (4th Cir. 2001); *James v. Mazda Motor Corp.*, 222 F.3d 1323, 1327 (11th Cir. 2000); *Hurley*, 222 F.3d at 383; *Fisher v. Ford Motor Co.*, 224 F.3d 570, 574 (6th Cir. 2000).[11]

In sum, when a FMVSS contains explicit and deliberate options from which a manufacturer must choose, then that standard is not a minimum safety standard.

C. Petitioners' claim undermines the broad policy decisions behind the Safety Act.

Petitioners fail to recognize the thoroughly analyzed, judicious policy decisions underlying not only FMVSS 208, but the entire Safety Act. The application of a common-law standard that conflicts with FMVSS 208 would destroy the national uniformity of federal standards desired by the Safety Act. *See* H.R. Rep. No. 89-1776, at 17 (1966) ("[T]his

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[11] *See also Ellison v. Ford Motor Co.*, 650 F. Supp. 2d 1298, 1306 (N.D. Ga. 2009); *Anthony ex rel. Lewis v. Abbott*, 289 F. Supp. 2d 667, 669 (D.V.I. 2003); *Stewart v. Gen. Motors Corp.*, 222 F. Supp. 2d 845, 849 (W.D. Ky. 2002); *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169, 177 (M.D. Pa. 2001); *Davis v. Nissan Motor Corp. in U.S.A.*, No. 99 C 1186, 2000 U.S. Dist. LEXIS 7851, at *5 (N.D. Ill. June 2, 2000); *Doomes v. Best Transit Corp.*, 890 N.Y.S.2d 526, 527 (N.Y. App. Div. 2009); *Parks v. Hyundai Motor Am., Inc.*, 668 S.E.2d 554, 557 (Ga. Ct. App. 2008); *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722, 729 (Ind. Ct. App. 2008); *Osman v. Ford Motor Co.*, 833 N.E.2d 1011, 1021 (Ill. App. Ct. 2005); *Heinricher v. Volvo Car Corp.*, 809 N.E.2d 1094, 1098 (Mass. App. Ct. 2004); *Hernandez-Gomez v. Volkswagen of Am., Inc.*, 32 P.3d 424, 427-28 (Ariz. Ct. App. 2001). *But see O'Hara v. Gen. Motors Corp.*, 508 F.3d 753, 764 (5th Cir. 2007); *Durham v. County of Maui*, 696 F. Supp. 2d 1150, 1151 (D. Haw. 2010); *Soto v. Tu Phuoc Nguyen*, 634 F. Supp. 2d 1096, 1102-03 (E.D. Cal. 2009); *MCI Sales & Serv. v. Hinton*, 272 S.W.3d 17, 25-28 (Tex. App. 2008).

preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards."). Instead of uniformity, some states—or different juries in the same state—could punish manufacturers for not having Type 1 belts, others could require only Type 2 belts, and yet others could require an even more aggressive active or passive restraint system not contemplated by the federal regulations. *See Kalo Brick*, 450 U.S. at 326 ("A system under which each State could, through its courts, impose . . . its own . . . requirements could hardly be more at odds with the uniformity contemplated by Congress."). The "unthinkable" situation feared by President Johnson ("50 standards for 50 different states") would become a reality. *See also Traffic Safety: Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess., pt. 1, at 606 (1966) (statement of Rep. Hathaway) (explaining that uniform national standards were needed because multiple and inconsistent state standards would "creat[e] chaos in the automotive industry").

Second, adopting Petitioners' position would essentially do away with NHTSA's policy decisions underlying FMVSS 208 as a whole. Petitioners' position would allow each lay jury to determine the appropriate type of seatbelt necessary for each plaintiff and each accident regardless of the decades of research on which federal experts made policy decisions. Allowing common-law claims to set aside a determination of NHTSA's safety policies would unduly interfere with the regulatory means

authorized by Congress to achieve the Safety Act's goals. *See* 15 U.S.C. § 1392(f)(3) (providing the federal government with the authority to determine what is "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment").

Third, allowing a jury to second-guess the wisdom of NHTSA's decisions or to re-write federal regulations in a way that appears to make sense in light of a single, perhaps unique, car accident would undermine the reliance that manufacturers should be permitted to place on these federal regulations. Such a result, as in this case, coming almost twenty years after Petitioners' minivan was placed on the market, would leave manufacturers forever uncertain as to which safety options they must choose in order to satisfy both the express federal regulations and the unpredictable state common law tort claims.

The common-law liability as claimed by Petitioners threatens to impose repeated, after-the-fact tort liability upon manufacturers for complying with a federal regulation. As so aptly stated in the Government's Brief, "NHTSA estimates that in 2008, approximately 1,040,438 vehicles in the United States were equipped with some Type 1 seatbelts, any one of which could potentially become the subject of a tort suit like this one." U.S. Br. 19. A common-law rule prohibiting the use of Type 1 belts in rear, inboard seats would punish automobile manufacturers in an unforeseeable, retroactive manner without fair notice and with unprecedented severity for exercising a right granted to them by

federal law.[12] This Court's interpretation of FMVSS 208 should be guided by avoiding a serious due process problem. When a federal regulation provides options for manufacturers on which they have relied, justice and fairness require that the manufacturers be entitled to rely upon that standard as establishing the duty of care.

CONCLUSION

The Court should uphold the judgment of the California Court of Appeal.

Respectfully submitted,

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[12] Neither Congress, nor a federal agency, nor a state can impose, without violating constitutional principles, such extreme liability retroactively. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (concluding that it was unconstitutional and fundamentally unfair for employers "to bear a burden that is substantial in amount, based on employers' conduct far in the past"); *Arkema Inc. v. Environmental Protection Agency*, --- F.3d ---, 2010 WL 3363449, at *6-8 (D.C. Cir. Aug. 27, 2010) (concluding that when a retroactive rule narrows the scope of its interpretation, it changes the legal landscape in an impermissible way).

APPENDIX

APPENDIX A

PLAC CORPORATE MEMBERS

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire the Americas LLC
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company

General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koleraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic

Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

No. 08-1314

Supreme Court, U.S.
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In The

Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*,

Respondents.

On Writ Of Certiorari to The California Court Of Appeal, Fourth Appellate District, Division Three

BRIEF OF PUBLIC JUSTICE, P.C., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Public Justice is a national public interest law firm dedicated to pursuing justice for the victims of corporate and government abuses. Through involvement in precedent-setting and socially significant litigation, Public Justice seeks to ensure that tort law fully serves its dual purposes of compensating those injured by wrongful conduct and deterring similar conduct in the future. Public Justice is gravely concerned that, if the tort system is limited excessively through an improper application of fundamental preemption principles, neither of these purposes will be served.[1]

SUMMARY OF ARGUMENT

One decade ago, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), Justice John Paul Stevens, joined by three other members of this Court, warned that the majority's relatively unrestrained approach to implied conflict preemption could lead to federal judges "running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes. . . ." *Id.* at 886 (Stevens, J.,

[1] *Amicus* is the sole author of this brief. No one other than *amicus* or its members made a monetary contribution to its preparation or submission. The parties have filed letters giving blanket consent to the filing of *amicus* briefs in this case.

dissenting). His prophetic words, alas, have proven all too true. In the 10 years since *Geier* was decided, it has generated immense confusion among the lower courts about the proper approach to determining whether a state tort lawsuit conflicts with federal regulatory purposes, and thus is preempted. Not only has *Geier* generated chaos in the auto safety arena, but the decision has metastasized into numerous other areas involving federally regulated products, leading courts to find federal preemption under circumstances that Congress could not conceivably have intended.

The confusion generated by *Geier* can – and, we submit, should – be addressed on at least two levels. First, the time is more than ripe for this Court to reconsider the meaning of the savings clause set forth in the National Motor Vehicle Safety Act, 49 U.S.C. §§ 30101 *et seq.*, (the "Safety Act"), which provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* at § 30103(e).

In *Geier*, this Court – after some equivocation – held that the savings clause does not "foreclose or limit the operation of ordinary 'conflict' preemption principles." 529 U.S. at 868. To hold otherwise, the Court said, could permit a state to "impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires" – a result

that, in the majority's view, Congress could not logically have intended. *Id.* at 871.

But there is another, narrower interpretation of the savings clause that is far more consistent with its plain language and history: to wit, that Congress merely intended to "save" from preemption claims that a car maker should have done more than the minimum required by a federal auto safety standard. Under this reading, any claims premised "upon the presence of the very . . . requirements that federal law requires" *would* be subject to implied conflict preemption. *Id.* This interpretation of the clause, which would leave so-called "impossibility"-type claims subject to preemption but preserve all others, is true to the language of the Safety Act and would effectively resolve much of the turmoil caused by *Geier*, both in the auto safety arena and elsewhere.[2]

---

[2] This Court has described "impossibility" preemption as occurring where it is "impossible for a private party to comply with both state and federal requirements." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotations omitted). Even though a jury verdict in a tort suit does not require a manufacturer to change its conduct in any respect, but instead merely requires the payment of damages, this Court has used "impossibility" to describe a case where a plaintiff's common-law claims are premised on, as Justice Breyer wrote, the presence of a particular design feature that federal law affirmatively requires. *Geier*, 529 U.S. at 871; *see generally Wyeth v. Levine*, 129 S. Ct. 1187, 1208-09 (Thomas, J., concurring) (describing various formulations this Court has used "in deciding whether state and federal law conflict, and thus lead to pre-emption, under the 'impossibility' doctrine.").

But assistance is needed on a broader level as well. The confusion generated by *Geier* is also symptomatic of a deeper doctrinal malady with regard to implied conflict preemption writ large. This Court has long struggled to find a workable approach in this area, which lies at the delicate intersection between the Supremacy Clause and the core values of federalism on which this country was founded. *Geier* attempted to navigate that junction by instructing courts to conduct highly particularized and fact-based inquiries into the underlying "purposes" of federal regulations, and then to determine whether those purposes would somehow be undermined by a state court lawsuit seeking damages from a federally-regulated tortfeasor. But, as Justice Stevens predicted, *Geier* has produced an incoherent morass of unprincipled decisions. That is not surprising, given that nine members of this Court could not, after intensely close scrutiny, agree on the core purposes underlying the single regulation at issue in *Geier*. Indeed, the mere fact of the deeply split decision in that case illustrates the unworkability of the standard enunciated by the majority's opinion.

This case presents an opportunity to correct this problem once and for all. As Justice Thomas has observed, what is needed is a workable standard that is faithful both to the U.S. Constitution and to the states' right to compensate their injured citizens through the tort system. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1204 (2009) (Thomas, J., concurring). This brief advocates a standard that eliminates the

"frustration-of-purposes" branch of implied conflict preemption analysis in favor of a rule that would focus solely on the extent to which a state law claim would directly contradict a specific federal mandate. Such a standard, which would limit implied conflict preemption to instances of so-called "impossibility," would solve the vexatious problems created by the approach adopted in *Geier* and, at the same time, respect the core values underlying the Supremacy Clause of the U.S. Constitution.

ARGUMENT

I. *GEIER* HAS BEEN WIDELY MISINTERPRETED AND MISAPPLIED BY THE COURTS AND THE EXECUTIVE BRANCH.

As the United States has observed, the lower courts "are currently in conflict about how to apply the reasoning of *Geier* to claims of [auto safety] preemption generally." U.S. Br. in Supp. of Review at 17-21. This assertion, while true, understates the problem to a large degree. As explained below, not only has *Geier* generated judicial confusion in the auto safety arena, but it has been misapplied in a host of other areas as well. Various executive agencies, including the National Highway Traffic Safety Administration ("NHTSA"), have also improperly interpreted *Geier* as authorizing them to mandate widespread preemption by regulatory fiat.

A. *GEIER* HAS GIVEN RISE TO A HOST OF IMPROPER DECISIONS FINDING PREEMPTION IN AREAS AFFECTING PUBLIC HEALTH AND SAFETY.

1. Auto Safety. Although *Geier*'s ruling was a narrow one, reflecting the unique history of the 1984 version of Federal Motor Vehicle Safety Standard ("FMVSS") 208 governing passive restraints in cars (and, in particular, the agency's objectives with regard to airbags), car manufacturers have used *Geier* to win far broader preemption rulings in areas that have nothing to do with airbags, arguing, in many cases, that the mere fact of a regulatory option is a sufficient basis for a court to find federal preemption. Thus, for example, immediately in the wake of *Geier*, a number of courts extended the majority's holding to cases involving challenges to a car maker's design of one of the other passive-restraint options permitted by the 1984 version of Standard 208.[3] Although readily distinguishable from *Geier* (in that they did not implicate any of the federal government's concerns about airbags), these courts and others were

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[3] *See, e.g., Carasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169 (M.D. Pa. 2001) (finding federal preemption of lawsuit challenging design of system that included automatic shoulder harness and manual lap belt); *Hernandez-Gomez v. Volkswagen of America, Inc.*, 32 P.3d 424 (Ariz. App. Div. 2001) (finding federal preemption of lawsuit challenging design of system that included automatic shoulder harness and no lap belt).

persuaded that *Geier* mandates preemption in all cases involving any sort of passive restraint in cars.

Courts have also extended *Geier* to cases involving *manual* belting systems in cars, which have nothing to do with the passive-restraint rule at issue in *Geier*. In *Griffith v. Gen'l Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), for example, the Eleventh Circuit found implied conflict preemption of a claim that General Motors was negligent for failing to provide a shoulder belt along with a lap belt in the front-center seat of a pickup truck. The Court held that the claim was preempted on the ground that it would conflict with a federal regulation that gave car makers the option of installing either a lap belt or a lap/shoulder belt in the front-center seats of cars (a seating position that was expressly exempted from the passive-restraint rule at issue in *Geier*). *Id.* at 1282. In so ruling, the Eleventh Circuit simply assumed, without citation to any supporting regulatory authority, that the federal agency goal underlying the standard at issue in *Geier* – specifically, the goal of encouraging a mixture of passive-restraint systems – also existed with respect to manual restraint systems, even though the federal government has never articulated any such goal with respect to manual restraints. *Id.* at 1281.

Griffith's misguided reading of *Geier* then spread to cases involving manual restraints in the rear-center seats of cars (which is closely related to the fact pattern of this case, which involves manual restraints in the aisle seat of a minivan). This trend

started with conflicting state court rulings in two cases similar to this one. In each case, the plaintiff was badly injured in the rear-center seat of a passenger car, which was equipped with a lap-belt rather than a lap/shoulder belt.[4]

At the time the cars were manufactured (in the late-1980s), federal law gave manufacturers the option of installing either lap-belts or lap/shoulder belts in the rear-center seats of cars. *See Heinricher v. Volvo Car Corp.*, 809 N.E.2d 1094, 1095-96 (Mass. 2004). This regulatory option, however, was not based on any of the special agency concerns at issue in *Geier* (namely, the desire to foster and phase in a diverse array of passive restraint technology). Rather, the rear-center-seat option, which was originally promulgated in 1967 along with the first set of minimum safety standards ever passed by the federal government, was unaccompanied by any special statement of agency purpose and appeared to be designed merely to codify existing industry practices. (At the time, car makers were installing both lap-belts and lap/shoulder belts in the rear seats of cars.) *See* 32 Fed. Reg. 2,408, 2,415 (Feb. 3, 1967). Since 1967, moreover, it had become increasingly clear to everyone – including the federal government – that lap/shoulder belts were, in fact, the safest form of

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[4] *See Heinricher v. Volvo*, 809 N.E.2d 1094 (Mass App. Ct.), *rev. denied*, 315 N.E.2d 1085 (Mass. 2004); *Brailsford v. Nissan*, No. 030-015647-CA (Fla. 17th Cir. Ct.).

restraint system for rear-center seats. *See, e.g.* 54 Fed. Reg. 25,275 (June 14, 1989).

Despite the obvious differences between the rear-center-seat option involved in these cases and the passive-restraint option at issue in *Geier*, the defendants in both *Heinricher* and *Brailsford* argued that the mere fact of a regulatory option demonstrates a federal desire to promote a diverse array of safety technology – the same purpose at issue in *Geier*. Ultimately, the *Brailsford* trial court rejected the defendant's argument in an unpublished one-paragraph order. But the *Heinricher* court disagreed, and issued a decision, later mirrored in *Carden v. Gen'l Motors Corp.*, 509 F.3d 227, 232 (5th Cir. 2007), that, pursuant to *Geier*, the plaintiffs' claims were preempted by NHTSA's decision to provide a regulatory option. *See* 809 N.E.2d at 1098.

This is but a sampling of the myriad adverse rulings generated by *Geier* in the auto safety context.[5]

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[5] Indeed, just four days ago, the Supreme Court of South Carolina added its own voice to the growing cacophony, misapplying *Geier* to hold that a mere options standard (in this case Standard 205) preempts a common-law tort suit. *Priester v. Cromer*, 2010 WL 2990978 (S.C. Aug. 2, 2010). The court acknowledged the confusion among lower courts, admitting that "courts across the country are struggling over Regulation 205 and whether it preempts conflicting state law actions." *Id.* at * 4. Nevertheless, the court decided that, "in the absence of a determination from the United States Supreme Court on this matter," because "the purpose of the regulation is to provide an automobile manufacturer with a range of choice among different types of glazing materials, as opposed to providing a minimum

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Even these few cases, however, illustrate the various ways in which lower courts have misinterpreted *Geier* to mean that *any* regulatory option exerts preemptive effect – a position that the United States has, in fact, disavowed in both this case and several pre-*Geier* cases as well. *See* U.S. Br. in Supp. of Review at 18.

2. Other Consumer Products. Another example of lower court misinterpretation of *Geier* comes in the prescription drug context. Prior to this Court's decision in *Wyeth*, the Third Circuit cited *Geier* as support for its ruling that a minimum labeling standard promulgated by the Food and Drug Administration ("FDA") preempted failure-to-warn claims involving brand-name prescription drugs. *Colacicco v. Apotex*, 521 F.3d 253 (3d Cir. 2008), *vacated*, 129 S. Ct. 1578 (2009). The defendants in *Wyeth* similarly relied on *Geier* as support for their preemption arguments – a tactic that prompted Justice Stevens, writing for the *Wyeth* majority, to issue a stern reminder that the regulations at issue in *Wyeth* and *Geier* were "very different." 129 S. Ct. at 1203; *but see id.* at 1217 (Alito, J., dissenting) (arguing that the majority's ruling "cannot be reconciled with *Geier*.").

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standard," the tort suit is preempted. *Id.* This decision only deepens the split among lower courts over the correct interpretation of Standard 205 and its preemptive effect. *See O'Hara v. Gen'l Motors Corp.*, 508 F.3d 753 (5th Cir. 2007); *Morgan v. Ford Motor Co.*, 680 S.E.2d 77 (W.Va. 2009).

In the wake of *Colacicco*, the Eastern District of Pennsylvania held that state-law claims related to radio frequency ("RF") emissions of cellular phones are impliedly preempted by federal law. *Farina v. Nokia*, 578 F.Supp.2d 740, 769 (E.D. Pa. 2008). There, the Federal Communications Commission ("FCC") set a "maximum limit" for RF emissions from cellular phones that was higher than the limit plaintiff claimed could cause biological damage. *Id.* at 769-70. The district court, applying *Geier* and *Colacicco*, dismissed the case on preemption grounds, reasoning that the plaintiff's attempt to "hold the manufacturers . . . liable even though [the plaintiff] [did] not allege that they failed to meet the required FCC standard" was "no different from the claim rejected by the Supreme Court in *Geier*." *Id.* In so ruling, *Farina* ignored *Geier*'s teaching that federal law does not preempt state-law claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Geier*, 529 U.S. at 868.

Before this Court intervened to address the problem, the Illinois Supreme Court likewise misapplied *Geier* in holding that the Federal Boat Safety Act ("FBSA"), 46 U.S.C. §§ 4301-4311, preempted state law claims that a boat manufacturer should be held liable for failing to install propeller guards on its motor boat engine. *See Sprietsma v. Mercury Marine*, 757 N.E.2d 75, 86 (Ill. 2001). There, the plaintiff claimed that a manufacturer was negligent for failing to install propeller guards on its motor boat engines. The manufacturer argued for preemption based on

the U.S. Coast Guard's decision not to require propeller guards on all boat engines. *Id.* at 83. Though the court acknowledged that the regulation at issue in *Geier* was highly-particularized and designed to promote unique agency goals, it ultimately read *Geier* as a one-size-fits-all recipe for implied conflict preemption and held that the plaintiff's claims were preempted by the Coast Guard's regulatory inaction, *id.* at 84-86 – a ruling that was then reversed by unanimous decision of this Court. *See Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).[6]

Sprietsma, however, did not cure the problems created by *Geier*. To the contrary, courts continued to distort *Geier* by applying it to facts more appropriately resolved by *Sprietsma*. The Eastern District of Tennessee, for example, held that state-law claims alleging that a bus manufacturer was negligent for not installing seatbelts are preempted by Standard 208, despite acknowledging that the standard was silent about seatbelts in buses. *Surles v. Greyhound Lines, Inc.*, 2005 WL 1703153, at *5-6 (E.D. Tenn. July 20, 2005). The court declined to apply *Sprietsma* even though NHTSA had not taken regulatory action, and used *Geier* instead to find preemption. *Id.*

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[6] The state high court reached this conclusion despite the fact that the FBSA contains a savings clause almost identical to the clause in the National Motor Vehicle Safety Act. *See* 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law").

Courts have also misapplied *Geier* in the area of consumer products. For example, the Eastern District of Missouri recently looked to *Geier* to find that, notwithstanding the savings clause contained in the Consumer Products Safety Act,[7] a minimum standard regulating the flammability and viscosity of contact adhesives promulgated by the Consumer Products Safety Commission ("CPSC") preempted state product liability claims. *Mwesigwa v. DAP, Inc.*, 2010 WL 979697, at *4 (E.D. Mo. Mar. 12, 2010). In so ruling, the court read *Geier* in reductive terms, as holding "that a common-law tort action, which would effectively mandate air bags, conflicted with the federal safety standard," *id.*, and ignored the fact that the CPSC had merely established minimum standards for the flammability and viscosity of contact adhesives – the type of regulation that, under *Geier*, should have no preemptive effect. *See* 529 U.S. at 874.

Likewise, *Geier* has been applied to hold that federal minimum safety standards preempt claims that certain mobile homes were unfit for human habitation. *See In re FEMA Trailer Formaldehyde*

[7] This savings clause provides that "[c]ompliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person." 15 U.S.C. § 2075.

Products Liability Litigation, 620 F. Supp. 2d 755 (E.D. La. 2009). In *FEMA*, the plaintiffs – residents of emergency housing units ("EHUs") provided by the federal government in the wake of Hurricanes Katrina and Rita – alleged that their EHUs contained unsafe amounts of formaldehyde. *Id.* at 756. Under the Manufactured Home Construction and Safety Standards Act ("MHA"), 42 U.S.C. §§ 5401-5426, the Department of Housing and Urban Development ("HUD") was tasked with regulating the acceptable level of formaldehyde gas exposure inside of a mobile home.[8] *Id.* at 757. During its rulemaking, HUD weighed two alternative standards: an "ambient air" standard, which measures the amount of formaldehyde in the air of the mobile home, and a "product standard," which measures the amount of formaldehyde in the constituent pieces of the mobile home. *Id.* at 763. HUD chose to adopt the "product standard" instead of the "ambient air" standard. *Id.*

In their lawsuit, the plaintiffs did not allege that their EHUs failed to meet HUD's "product standard" regulations; instead, they merely asserted that the

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[8] The MHA, like the Motor Vehicle Safety Act, the Boat Safety Act, and the CPSA, also contains a savings clause, which states that "[c]ompliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from any liability under common law." 42 U.S.C. § 5409(c).

manufacturers should have limited the amount of formaldehyde in the air of their EHUs – a duty that, under *Geier*, state law should have been free to impose. *See* 529 U.S. at 868. The Eastern District of Louisiana nonetheless held the plaintiffs' claims to be preempted under *Geier*, reasoning that to hold the manufacturer liable for failing to meet an "ambient air" standard not required by federal law "would serve as an obstacle to [HUD]'s objectives of achieving a balance between uniformity, safety, and affordability." *In re FEMA*, 620 F. Supp. 2d at 766 (citing *Geier*, 529 U.S. at 881).

* * *

Geier has thus been applied to invalidate a host of state law claims, both in the auto safety context and in a broad range of other areas involving federally regulated products in which Congress could not conceivably have intended to displace state law. In the auto safety context, *Geier* has repeatedly been read to mean, simply, that "regulatory options equal preemption." And, in numerous other areas courts have read *Geier* as mandating a finding of preemption even in cases involving minimum standards, despite *Geier*'s own clear statement that such standards do not exert preemptive effect. Plainly this will not do. Yet, absent clear guidance from this Court, *Geier* will continue to sow confusion in the courts below.

B. NHTSA AND OTHER AGENCIES HAVE MISINTERPRETED *GEIER* AS AUTHORIZING PREEMPTION BY REGULATORY FIAT.

Geier's approach to implied conflict preemption has also produced uncertainty in the executive branch. After *Geier* was decided, NHTSA issued, in short order, three separate proposed rules that purported to have preemptive effect. Following NHTSA's lead, other agencies began their own attempts at preemption by regulatory fiat. As this Court has wisely remarked in the context of agency-created causes-of-action, "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). Despite this warning, however, NHTSA and other federal agencies, either explicitly or implicitly relying on *Geier*, have taken the position that state-law claims would undermine their regulatory purposes, and thus should be preempted.

1. NHTSA's Preemption Preambles. This approach began when NHTSA proposed altering the definition of a "designated seating position" ("DSP") in passenger vehicles. *See* 70 Fed. Reg. 36,094, 36,096 (June 22, 2005). The agency suggested adopting the Society of Automotive Engineers' definition of a 5th-percentile female passenger for the proper measure of hip-room to measure a DSP. *Id.* Citing *Geier*, NHTSA argued, in a preamble to the proposed rule, that the altered rule would preempt all state laws, regulations, and requirements – including state tort law –

because any additional safety standards would frustrate the agency's purpose of promoting seatbelt use. *Id.* at 36,098.

Shortly thereafter, NHTSA included preemptory language in its proposal to increase minimum standards for roof strength and headroom in order to prevent rollover-related deaths. *See* 70 Fed. Reg. 49,223, 49,235 (Aug. 23, 2005). Though the proposed change only strengthened existing minimum standards – and thus, under *Geier*, should not have exerted any preemptive effect – NHTSA asserted that any state law seeking to hold a car maker liable for failing to make a roof stronger than the new regulatory minimum would "frustrate the agency's objectives by upsetting the balance between efforts to increase roof strength and reduce rollover propensity." *Id.* at 49,245. Accordingly, the agency asserted that the changed rule would "preempt all conflicting State common law requirements, including rules of tort law." *Id.* at 49,246.

Less than a month after the rollover rulemaking notice, NHTSA purported to preempt state tort law in a notice of proposed rulemaking regarding the rearview standards for large trucks. *See* 70 Fed. Reg. 53,753, 53,768 (Sept. 12, 2005). Even though this proposed options standard was unsupported by any of the policy reasons at issue in *Geier*, the agency asserted that any state-law requirements above and beyond the federal minimum would upset the agency's "careful balancing of a variety of considerations and objectives in this field," as well as its

interpretation of Congress's intent to have uniform standards for trucks. *Id.* at 53,768-53,769.

2. Other Agencies' Preemptive Actions. Thereafter, other agencies followed NHTSA's lead and inserted preemptory language into the preambles of proposed and final rules. For example, despite the savings clause in its governing statute, *supra* n.7, the CPSC included a preemption provision in a rulemaking notice related to minimum flammability standards for mattresses that read: "[t]he Commission intends and expects that the new mattress flammability standard will preempt inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements." 71 Fed. Reg. 13,472, 13,496 (Mar. 15, 2006). Similarly, in the 2006 preamble that was ultimately rejected by this Court in *Wyeth*, the FDA opined that state-law failure-to-warn actions regarding prescription drugs could "frustrate the agency's implementation of its statutory mandate" to provide minimum labeling standards for drugs. 71 Fed. Reg. 3,922, 3,934 (Jan. 24, 2006).

3. Efforts at Curbing Regulatory Preemption. These attempts to preempt state tort law without express Congressional authorization created a firestorm of controversy within the legal community

and press.[9] Likewise, members of Congress demanded answers from the agencies, to no avail.[10]

Ultimately, however, shifting political tides and priorities ended NHTSA's and other agencies' preemption assertions. After President Barack Obama took office, NHTSA vacated the preemption language in the preamble to its roof-strength rule. *See* 74 Fed. Reg. 22,348, 22,380-22,383 (May 12, 2009). President Obama then issued an executive memorandum forbidding agencies from promulgating unsupported

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[9] *See generally* Catherine Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007) (examining controversy surrounding preemption by regulatory fiat); William Buzbee, *Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1573 (2007) (noting the sudden explosion of regulatory preemption provisions during the Bush Administration); Samuel Issacharoff & Catherine Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (same); Stephen Labaton, "'Silent Tort Reform' Is Overriding States' Powers," N.Y. TIMES, Mar. 10, 2006, at C5 (highlighting preemption by regulatory fiat as a new approach to federal preemption).

[10] Senators Arlen Specter and Patrick Leahy demanded an explanation as to how, in the absence of an express preemption clause by Congress, the agency thought it had the authority to preempt state law by mere regulatory fiat. *See* Letter from Senators Arlen Specter and Patrick Leahy to Jacqueline Glassman, Acting Director of NHTSA (Nov. 17, 2005). Similarly, in response to the CPSC's mattress flammability rulemaking, Senator Daniel Inouye raised concerns about the persistent adverse safety effects preemption by regulatory fiat could have on consumers for years to come. Letter from Senator Daniel Inouye to Hal Stratton, CPSC Chairman (Feb. 13, 2006).

preemptive preambles. 74 Fed. Reg. 24,693 (May 20, 2009).

In response, NHTSA vacated the preemptory language of its other rulemakings. *See* 74 Fed. Reg. 68,185, 68,188-68,189 (Dec. 23, 2009). Several months later, the agency admitted that, notwithstanding all its former statements, there had never been any conflict between any of the post-*Geier* regulations and common-law claims, and that all its statements to the contrary were a mistake. In so doing, the agency emphasized its "strong belief that State law can play an important role in safeguarding public safety." *See* 75 Fed. Reg. 33,515, 33,524 (June 14, 2010).

* * *

It is likely that none of this would have occurred had it not been for *Geier*. By embracing the "frustration-of-purposes" branch of implied conflict preemption, this Court virtually invited various agencies to begin asserting that regulations exerted preemptive effect even if the agencies' authorizing statutes said otherwise. These reactions overstepped the limits of the agencies' authority. Congress, of course, is the only branch that is accorded the power to preempt state laws, and it is the job of courts, not of federal agencies, to determine the existence of preemption. *See Wyeth*, 129 S. Ct. at 1207-08 (Thomas, J., concurring). Moreover, (as NHTSA ultimately conceded) the agencies' conclusions were not even faithful to *Geier* itself, which, for all its flaws, at least made clear that mere minimum

standards do not exert preemptive effect. This Court may have intended *Geier* to be a limited holding, *see* 529 U.S. at 867 (majority opinion) (cautioning that its holding was limited to "th[ese] kind[s] of 'no airbag' lawsuits"), but agencies have understood the decision to further preemptive goals never intended by Congress. Unless and until *Geier* is clarified, there is always a chance that this confusion will resurface.

II. THIS COURT SHOULD CLARIFY THAT THE SAFETY ACT'S SAVINGS CLAUSE EXPRESSLY PRESERVES ALL COMMON-LAW CLAIMS THAT WOULD HOLD A MANUFACTURER LIABLE FOR FAILING TO DO MORE THAN THE MINIMUM REQUIRED BY A FEDERAL SAFETY STANDARD.

In light of the foregoing, there can be no doubt that *Geier* has created significant practical problems for courts that are tasked with deciding whether a federal law displaces a state common-law tort claim. But much of the current disarray stems from – and could be addressed by resolving – *Geier's* own confusion regarding the exact role of the Safety Act's savings clause vis-à-vis state-law claims.[11]

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[11] The savings clause reads as follows: "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 49 U.S.C. § 30103(e). The Safety Act also contains an express preemption provision, *id.* § 30103(b)(1), which this

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1. In *Geier*, the majority seemed to vacillate over the exact meaning and effect of the savings clause, leading it to adopt a pair of seemingly contradictory conclusions. At the outset, Justice Breyer acknowledged that, in order to give "actual meaning to the saving clause's literal language," it must be "assume[d] that there are some significant number of common-law liability cases to save." *Geier*, 529 U.S. at 868. He therefore stated that the savings clause "preserves those actions that seek to establish greater safety than the minimum achieved by a federal regulation intended to provide a floor." *Id.*

Later in the opinion, however, Justice Breyer backed away from this interpretation of the clause, based on a belief that the absence of ordinary preemption principles could permit a state law to "impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires," thereby causing the Safety Act to "destroy itself." *Id.* at 871-72 (internal citations and quotations omitted). Based on this concern, he then wrote that the savings clause did not "foreclose or limit the operation of ordinary 'conflict' preemption principles. . . ." *Id.* at 868.

These seemingly disparate conclusions about the meaning of the savings clause produce a thorny

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Court held in *Geier* does not expressly preempt any common-law claims. 529 U.S. at 868.

paradox: if the savings clause does, in fact, "preserve[] those actions that seek to establish greater safety than that imposed by a federal regulation intended to provide a floor," *id.* at 868, then it necessarily bars the application of ordinary conflict preemption principles to those claims – something that the Court explicitly said the savings clause does not do. *See id.* at 869. If, on the other hand, the savings clause does not limit "the operation of ordinary 'conflict' preemption principles . . . ," *id.*, then what did the Court mean when it said that the clause "preserves those actions that seek to establish greater safety than the minimum achieved by a federal regulation intended to provide a floor"? *Id.*

2. Given the confusion caused by *Geier*, this Court should address and resolve this incongruity. The first step toward doing so is to recognize that Justice Breyer's concern that a broad reading of the savings clause would permit the statute to "destroy itself," *id.* at 872, is based on a misreading of the Safety Act as a whole. When Congress passed the Safety Act in 1966, it empowered NHTSA to prescribe "motor vehicle safety standards," which *Congress* defined as "*minimum* standard[s] for motor vehicle performance or motor vehicle equipment performance. . . ." 49 U.S.C. § 30102(a)(9) (emphasis added). As a result, NHTSA is only authorized to issue standards that set minimum safety floors that automobile manufacturers must meet. *See Geier*, 529 U.S. at 903 (Stevens, J., dissenting) (pointing out that the majority "completely ignores the important fact

that by definition all of the standards established under the Safety Act . . . impose minimum, rather than fixed or maximum, requirement); *see also Wyeth*, 129 S. Ct. at 1201 ("[A]gencies have no special authority to pronounce on pre-emption absent delegation by Congress."); *New York v. FERC*, 535 U.S. 1, 18 (2002) ("[A] federal agency may pre-empt state law only when it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a State, unless and until Congress confers power upon it.").

In light of this statutory limitation on the agency's authority, Congress could only logically have intended for the savings clause to preserve common-law tort actions seeking to hold a manufacturer liable for failing to do more than a regulation required – which, by definition, is a minimum standard. For this type of claim, one based on a theory that the manufacturer should have done more than the bare minimum required by federal law, the savings clause makes clear that *there is no conflict* with the federal regulation. But the sort of claim posited by the *Geier* majority, which would "premise liability upon the presence of the very . . . requirements that federal law requires," *id.* at 871, would not be "saved" from preemption by virtue of the savings clause, because the clause was never intended to address this type of claim in the first place.

Under this reading of the clause, there is no scenario under which the Safety Act would "destroy

itself"; to the contrary, it is clear that Congress intended to exclude from the scope of the clause any claim that would seek to hold a manufacturer liable for failing to take some action that would actually violate federal law. *See id.*[12] When read in conjunction – as it must be – with Congress's explicitly limited delegation to NHTSA to issue minimum standards, the savings clause does not bar the operation of ordinary conflict preemption principles for *only* those

[12] This interpretation is supported by the Safety Act's legislative history. The savings clause was added to the legislation in response to the testimony of an attorney from South Carolina, Tom Triplett, who expressed concern that, "[i]f the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30 year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of 'Our product meets Government standards,' and an already compounded problem will be recompounded." *Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1249 (1966). Consistent with the foregoing, the House Committee amended the original House bill by inserting a savings provision identical in all respects to the savings provision ultimately signed into law. *See* 112 Cong. Rec. at 19857 (1966). This savings provision was explained in the House Committee Report as follows: "It is intended, and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability.*" H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added). (A thorough discussion of the legislative history of the Safety Act's savings clause is set forth in the petitioner's opening brief in *Geier*. *See* Br. of Petitioner, No. 98-1811 (U.S. Oct. 22, 1999).)

"impossibility"-type cases where the claims would impose requirements that "conflict directly with regulatory mandates. . . ." *Id.* at 872. For all *but* these claims, the clause operates to expressly preserve them.

Giving the savings clause its intended meaning would both correct misapplication of *Geier* in the auto safety context and also clarify the law in cases involving other statutes containing similar savings clauses. *See, e.g., supra* at nn.6-8. The Court should take this opportunity to remind courts that when an agency is empowered only to promulgate a minimum safety standard against the backdrop of an explicit savings clause, Congress has expressly preserved state-law claims that seek to hold a manufacturer liable for failing to do more than the minimum required by that regulation.

III. THE DOCTRINE OF IMPLIED CONFLICT PREEMPTION SHOULD BE GREATLY RESTRICTED TO AVOID UNDUE INTERFERENCE WITH STATE AUTHORITY.

Although many of the problems created by *Geier* would be cured by giving the Safety Act's savings clause (and others like it) its full meaning, such a holding would do nothing to address the broader difficulties created by the "frustration-of-purposes" arm of implied conflict preemption. As the *Geier* dissenters predicted, this Court's current "frustration-of-purposes" preemption doctrine encourages a

free-ranging judicial expansion of federal power unmoored from the text of a congressional statute – an expansion that undermines core federalism values and upsets the balance established by the Framers. By emphasizing that implied conflict preemption should only be found in the rarest of circumstances – e.g., the "impossibility" scenario posited by the *Geier* majority – this Court would realign implied conflict preemption jurisprudence with the core principles underlying the Supremacy Clause and solve the vexatious problems created by its past missteps.

A. THE "FRUSTRATION-OF-PURPOSES" ARM OF IMPLIED CONFLICT PREEMPTION ANALYSIS SHOULD BE ELIMINATED.

1. A decade ago, Justice Stevens – joined by three other Members of this Court – warned of the threat posed by an uncabined "frustration-of-purposes" preemption standard. "[T]he Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States." *Geier*, 529 U.S. at 894 (Stevens, J., dissenting). Instead, he wrote, state laws "are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so." *Id.* (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)). Absent some limiting principle, Justice Stevens cautioned, nothing would prevent judges from "running amok" with the "frustration-of-purposes" branch of implied conflict

preemption, applying it to invalidate a range of state laws that Congress never intended to be trumped by federal law. *Id.* at 907.

As explained *supra* at I.A, this is exactly what has occurred. And this outcome, far from surprising, is born from the doctrine itself. As this Court has instructed, the "frustration-of-purposes" inquiry requires a court first to ascertain the "full purposes and objectives" of the federal law and then to decide whether the state law poses an "obstacle to the accomplishment and execution" of those purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Yet courts are given no direction for how to go about determining whether, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment of the full purposes of Congress. This Court has said the task consists of "examining the federal statute as a whole" and "identifying its purpose and intended effects," but has given little additional guidance except to say that the determination is "a matter of judgment." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). The Court has not identified, with any precision, which factors should be considered when analyzing this preemption question or how much weight should be accorded various aspects of the "entire scheme." *Savage v. Jones*, 225 U.S. 501, 533 (1912) (instructing courts to consider the "entire scheme" of the at-issue statute or regulation); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (directing courts to "[l]ook[] to the

provisions of the whole law, and to its object and policy") (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)); *Hines*, 312 U.S. at 69-74 (explaining that the inquiry should rely on "the nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by law").

Indeed, this Court's own decisions applying this doctrine demonstrate just how malleable the approach can be. In *Geier*, for example, the majority relied on a diverse set of considerations that included agency comments, regulatory history, and agency litigating positions to discern the purposes of the agency regulation. *See* 529 U.S. at 875-81. In *Wyeth*, by contrast, this Court rejected the Government's litigating position and the agency's contemporaneous comments as useful indicia of federal purpose. *See* 129 S. Ct. at 1201-03. The Court has even relied on public sentiment, statements of individual Members of Congress, and agency or congressional inaction to ascertain the purposes of a federal law. *See, e.g.*, *Hines*, 312 U.S. at 69-74. It is no wonder, then, that under the guise of the "frustration-of-purposes" branch of this Court's preemption doctrine, courts "routinely invalidate" state laws based on an assortment of rationales, including "perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring). This type of "freewheeling judicial inquiry into

whether a state statute is in tension with federal objectives," inevitably produces "vague" and "potentially boundless" justifications for striking down state laws. *Id.* at 1207-08 (internal quotations omitted).

2. In addition to the practical dangers in its application, "frustration-of-purposes" preemption also suffers from serious doctrinal flaws. The *sine qua non* of preemption jurisprudence is Congress's intent. The Supremacy Clause requires that any preemption analysis "start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Thus, any understanding of the scope of preemption of a statute "must rest primarily on a fair understanding of *congressional purpose*." *Medtronic*, 518 U.S. at 485-86; *see also Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (instructing that the purpose of Congress is the "ultimate touchstone" in every preemption case).

Whereas the task of identifying congressional purpose is relatively straightforward in express preemption cases, *see e.g., English v. Gen'l Elec. Co.*, 496 U.S. 72, 78 (1990) ("[W]hen Congress has made its intent known through explicit statutory language, the courts' task is an easy one"); *but cf. Cippollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (demonstrating that even the task of finding express preemption is sometimes exceedingly difficult), determining congressional intent is at its most difficult in "obstacle" or "frustration-of-purposes" cases, which

often arise under broad congressional mandates ordering administrative agencies to set minimum safety standards or labeling requirements. *See, e.g.*, *Geier*, 529 U.S. at 875. In this context, neither the plain language of the statutes nor their implementing regulations provide much – if any – useful evidence regarding congressional intent on preemption.

Instead, "frustration-of-purposes" preemption relies on an inherently flawed premise: that courts can ferret out the purposes behind an agency regulation and determine the extent to which they are affected by a state law. It is difficult enough to determine the congressional purposes underlying a *statute*.[13] When courts speculate about the reasons behind an agency's regulation – which they

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[13] As this Court has explained, congressional laws in their final form often embody disparate, even divergent, objectives. *See Wyeth*, 129 S. Ct. at 1215 (Thomas, J., concurring) ("Federal legislation is often the result of compromise between legislators and groups with marked but divergent interests."); *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003) (explaining that laws often embody multiple, even contrary, objectives); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002) (identifying congressional compromise in final version of statute); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 561 (2001) (rejecting interpretation of statute that would "eliminate a significant *quid pro quo* of the legislative compromise"). Even if we "suppose that all members of Congress can agree on the 'full purposes and objectives' behind a particular federal statute[,] [t]here still is no reason to assume that they would want to displace whatever state law makes achieving those purposes more difficult." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 280 (2000).

necessarily must do under a "frustration-of-purposes" analysis – they exercise a power not granted to them and traffic in a dangerous form of legal fiction. *Cf. Wyeth*, 129 S. Ct. at 1217 (Thomas, J., concurring) ("Judicial supposition about Congress' unstated goals" undermines the settled judicial rule that courts must "merely interpret the language of the statutes enacted by Congress.") (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002)). The key element in any preemption inquiry – the element that ensures that a court remains faithful to the Supremacy Clause – is "whether the state law conflicts with the *text* of the regulation or statute." *Wyeth*, 129 S. Ct. at 1208 (Thomas, J., concurring) (emphasis added). As Justice Thomas has explained, "[w]hen analyzing the pre-emptive effect of federal statutes or regulations validly promulgated thereunder, 'evidence of pre-emptive purpose [must be] sought in the text and structure of the [provision] at issue.'" *Id.* at 1207 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

It almost goes without saying that an approach that asks a court to ascertain "broad federal policy objectives" from the record of an administrative rulemaking "wander[s] far from the statutory text." *Id.* at 1205. When these "objectives" are then used to strike down state laws, the Supremacy Clause is transformed from a guardian of the federal-state balance of power into a threat to the core values of federalism on which this country was founded. *Id.*

3. Given these concerns, a majority of members of this Court have, at various times, but with increasing alacrity, echoed Justice Stevens' call (joined by Justices Ginsburg, Thomas, and Souter), for a return to a more principled approach to implied conflict preemption. In *Gade*, Justice Kennedy resisted the "undue expansion of our implied preemption jurisprudence," which he found "neither wise nor necessary." 505 U.S. at 109 (Kennedy, J., concurring). Any conflict, in his view, "must be irreconcilable. . . . The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute." *Id.* at 110. Thus, conflict preemption, in his view, "should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress' primary objective, as conveyed with clarity in the federal legislation." *Id.*

Justice Scalia, as well, has refused to endorse this Court's sweeping application of the "frustration-of-purposes" standard. In *Bates v. Dow Agrosciences LLC*, he agreed that the preemption analysis should be limited to the plain language of the at-issue federal statute. *See* 544 U.S. 431, 455-59 (2005) (Scalia, J., joining with Thomas, J., concurring in part and dissenting in part). Doing more, including relying on legislative history to ascertain the congressional purposes of the statute, was both unnecessary and unjustified. Justice Scalia ultimately concurred with Justice Thomas that the decision not to undertake an analysis into the underlying principles of a statute to

decide preemption issues "comports with this Court's increasing reluctance to expand federal statutes beyond their terms." *Id.* at 459.[14]

4. The foregoing make clear that the time has come to disavow the "frustration-of-purposes" implied preemption doctrine. Doing so would largely eliminate the judicial and executive excesses that occurred in the wake of *Geier*, while, at the same time, preserving the preeminence of federal law in areas where the requirements of state and federal law actually contradict each other. In the face of scores of cases dramatically – and unjustifiably – expanding the use of this doctrine to invalidate legitimate exercises of state sovereignty, the efficacy of the "frustration-of-purposes" implied conflict preemption conceit is no longer defensible. As a majority of current Justices have instructed, placing the power of

[14] Commentators and advocates from across the ideological spectrum have, for years, also expressed strong concerns about the deep flaws inherent in this doctrine. *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1177 (3d ed. 2000) ("[P]reemption analysis is, or at least should be, a matter of precise statutory construction rather than an experience in free-form judicial policymaking."); Erwin Chemerinsky, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 377 (2d ed. 2002) (stating that the "Court purports to be finding congressional intent" when it is really "left to make guesses" because the intent is obscured); Kenneth Starr et al., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE 36, 38 (1991) (explaining that "frustration of purposes" preemption "encourages courts to make less than fully textured, careful judgments about the central or animating concern of a statute" and "demands a high degree of judicial policymaking").

preemption in the hands of Congress, "which is far more suited than the Judiciary to strike the appropriate state/federal balance" and requiring "that Congress speak clearly when exercising that power," would allow the "structural safeguards inherent in the normal operation of the legislative process to operate to defend state interests from undue infringement." *Geier*, 529 U.S. at 907 (Stevens, J., dissenting). This Court should reaffirm that, absent express preemption, state law should be displaced only where compliance with federal and state law would be an "impossibility." *See Wyeth*, 129 S. Ct. at 1208-09 (Thomas, J., concurring).

B. AT THE LEAST, IMPLIED CONFLICT PREEMPTION SHOULD ONLY BE FOUND IN THE NARROWEST OF CIRCUMSTANCES, WHERE THERE IS A CLEAR AND UNMISTAKABLE CONFLICT BETWEEN STATE TORT LAW AND FEDERAL PURPOSES.

At the very least, the confusion generated by *Geier* should be addressed by clarifying the fundamental preemption principle applied in *Geier*: that "frustration-of-purposes" implied conflict preemption imposes a demanding standard that can only be met through a particularized and fact-bound analysis of the text and structure of the federal regulation at issue.

This requirement – which demands a thorough and detailed reading of the federal regulation – has

in the wake of *Geier*, often been disregarded by lower courts. Rather than undertaking the detailed analysis mandated by this Court and performed in all of *its* "frustration-of-purposes" implied conflict preemption cases, many lower courts have substituted an approach notable principally for its superficiality, looking most frequently either to whether the regulation has been held before to have preemptive effect, *see, e.g.*, *Williamson v. Mazda Motor of America, Inc.*, 84 Cal. Rptr. 3d 545, 552-54 (Cal. Ct. App. 2008), or to whether the regulation sets a minimum standard or gives manufacturers a range of options. *See, e.g.*, *Griffith*, 303 F.3d 1276 (11th Cir. 2002).

To cure this defect, this Court should, at the least, reiterate that the approach it followed in *Geier* and *Wyeth* requires more than just an uncritical scan of the regulation. Instead, a determination of whether a state law frustrates the objectives of a federal regulation necessitates a careful and exhaustive inquiry revealing "clear evidence of a conflict." *Geier*, 529 U.S. at 885. The regulatory scheme must be examined "as a whole," with sufficient attention given to the various elements that may plausibly inform a court's analysis of the purposes of the regulation and a determination of whether a state law's requirements are in direct contradiction with that federal regulation. *Crosby*, 530 U.S. at 373. And a court *must* analyze each element for its "thoroughness, consistency, and persuasiveness" before it may assess its significance for preemption purposes. *Wyeth*, 129

S. Ct. at 1201 (instructing that the weight accorded to various elements "depends on [their] thoroughness, consistency, and persuasiveness"). Finally, once a court ascertains the precise objective of the regulatory scheme, it must carefully balance the theory underlying the state common-law claim with the purposes of the regulation.

The lower court performed none of these tasks in this case. Indeed, the California Court of Appeals performed *no* independent evaluation of the federal objectives embodied by the actual version of the regulation at issue in the case. Instead, the court simply followed the broad holding endorsed in a number of cases, that *Geier* applies to any lawsuit "involving a manufacturer's choice between passive restraint options," including NHTSA's "regulation of seat belt use." *Williamson*, 84 Cal. Rptr. 3d at 553 (citing cases). That holding contradicts the fundamental principle, applied in *Geier*, that, under a "frustration-of-purposes" preemption inquiry, a proper balancing of the federal regulation's objectives with the at-issue state law must include a particularized factual analysis of the specific regulation at issue.

Absent clarification by this Court about what a proper "frustration-of-purposes" implied conflict analysis approach entails, lower courts will continue to tread on the fundamental values embodied by the Supremacy Clause. This Court has never condoned the type of conclusory, superficial analysis applied by the court below, and to do so now would effectively

repeal whatever constraints the "frustration-of-purposes" doctrine might actually possess. What is more, the approach adopted by lower courts allows both courts and agencies to easily game the system, preempting state laws that have no direct conflict with the federal law. The Court should not endorse a regime that permits such conduct. The U.S. Constitution and the federalism principles underlying our nation forbid it.

CONCLUSION

The lower court's decision finding preemption of petitioners' claims should be reversed.

Respectfully submitted,

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